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IN THE

Supreme Court of the United States

SALVATORE GRAVANO,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991), this Court held that a law requiring the escrow of money owed to a person for an expressive work containing a description of a crime violated the First Amendment's Free Speech Clause, because it imposed a financial burden on speakers based on the content of their speech and was "significantly overinclusive" (*id.* at 121) with respect to its proffered objectives.

The question presented here is whether a State may apply a racketeering forfeiture statute to permanently forfeit a person's right to receive payment in connection with an expressive work, based on the State's judgment that the work's marketability derives from the fact that it contains a notorious criminal's account of his crimes, without violating the First Amendment principles set forth in *Simon & Schuster*.

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Petitioner Salvatore Gravano respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona in this case.

OPINIONS BELOW

The order of the Supreme Court of Arizona denying review of the Court of Appeals' decision (Pet. App. at 44a-45a) is unreported. The opinion of the Arizona Court of Appeals (*id.* at 1a-26a) is reported at 60 P.3d 246 and 204 Ariz. 106. The minute entry and order of the Superior Court of Maricopa County (Pet. App. at 27a-43a) are unreported.

STATEMENT OF JURISDICTION

The Arizona Supreme Court denied review of the Court of Appeals decision on June 30, 2003. *Id.* at 44a. By order entered on September 10, 2003, Justice O'Connor extended petitioner's time to file a petition for a writ of certiorari to and including October 28, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991), this Court held that New York could not apply its "Son of Sam" law to escrow money derived from expressive works containing descriptions of crimes without running afoul of the First Amendment. This case presents the question of whether a State may circumvent *Simon & Schuster* by characterizing the forfeiture of revenues derived from expressive works containing descriptions of crimes as an application of a general forfeiture law, rather than a "Son of Sam" law.

A. In return for a share of the royalties from the resulting book, petitioner Salvatore Gravano agreed to cooperate with Peter Maas, the author of such acclaimed accounts of the criminal justice system as *The Valachi Papers* and *Serpico*, in the creation of a book recounting Gravano's experiences as a member of New York's Gambino organized crime family. *See* Ex. B. to State's Response to Motion for Partial Dismissal

Re: Book Proceeds in No. CV 2000-007692 (Maricopa County Superior Court). Gravano described his experiences to Maas, who turned the material Gravano provided him into the book *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia* ("*Underboss*"). Pet. App. at 3a. *Underboss*, published in 1997 by Harper-Collins (UK), Inc., quickly became a best-seller and received widespread critical acclaim. In the New York Times, for example, novelist Donald E. Westlake described *Underboss* as "a terrific and, I think, important book . . . a morality play on the subject of loyalty." Donald E. Westlake, *A Good Family Man*, N.Y. Times, May 18, 1997.

As recounted in *Underboss*, Gravano pleaded guilty to violating the federal Racketeer Influenced and Corrupt Organizations Act in 1991. Pet. App. at 2a. Pursuant to his plea agreement, Gravano offered extraordinary assistance to the government in the prosecution of senior organized crime figures. *Id.* at 3a. He received and completed a five-year sentence for his crimes, and then entered the witness protection program. *Ibid.*

B. Soon after *Underboss* was published, New York, which had amended its "Son of Sam" law after this Court's *Simon & Schuster* decision, *see New York State Crime Victims Bd.* v. *T.J.M. Prods., Inc.*, 705 N.Y.S.2d 320, 322 (N.Y. App. Div. 2000), attempted to apply its revised law to forfeit Gravano's royalties from the book. *See id.* at 323; Pet. App. at 4a n.1. The New York courts rejected that effort, holding that the State's Crime Victims Board lacked the authority to invoke the statute in the absence of any action for recovery filed by a victim. *See T.J.M. Prods.*, 705 N.Y.S.2d at 324-26. No State's "Son of Sam" law has survived a First Amendment challenge since *Simon & Schuster* was decided. *See Keenan*

v. *Superior Court of Los Angeles County*, 40 P.3d 718 (Cal.), *cert. denied*, 537 U.S. 818 (2002); *In re Opinion of the Justices to the Senate*, 764 N.E.2d 343 (Mass. 2002); *Bouchard* v. *Price*, 694 A.2d 670 (R.I. 1997); *Curran* v. *Price*, 638 A.2d 93 (Md. 1994).

Arizona, which has had its own "Son of Sam" law on the books since 1978, *see* Pet. App. at 4a n.1 (*citing* Ariz. Rev. Stat. Ann. § 13-4202 (West Supp. 2001)), next took up the cause of forfeiting the proceeds from *Underboss*. But Arizona adopted a novel strategy for doing so: Instead of using its "Son of Sam" law, Arizona, after arresting Gravano on drug charges unrelated to the subject-matter of *Underboss* (*id.* at 2a-3a), filed a civil forfeiture complaint against Gravano that relied on a statute entitling the State to forfeit all property derived from racketeering offenses. *See id.* at 3a, 56a-57a. Pursuant to this statute the State sought "forfeiture of all rights of Gravano to payment, royalties, receipt of the beneficial interest of any trust, and receipt of any benefit by any means present or future in connection with the preparation, publication, or promotion of [*Underboss*]." *Id.* at 3a (internal quotation marks omitted).

In light of Arizona's forfeiture action, Gravano, who was owed compensation for his cooperation with Maas in the creation of *Underboss*, obtained a court order directing the publisher to deposit his share of the royalties with the trial court. *See id.* at 4a. He then moved for dismissal of the portion of the State's complaint seeking forfeiture of these royalties, arguing (*inter alia*) that the book royalties did not come within the scope of the forfeiture statute, and that the forfeiture of his compensation for working on the book would violate his rights under the First Amendment's Free Speech Clause. *Ibid.*

The trial court rejected these arguments, finding the statute applicable to the *Underboss* royalties and reasoning that "[t]he Arizona forfeiture statutes are content neutral and narrowly drawn, relating only to racketeering violations." *Id.* at 36a. The court declared Gravano's rights to compensation for the creation of *Underboss* forfeited to the State of Arizona, and subsequently granted the State partial summary judgment with respect to the forfeiture. *Id.* at 43a.

C. Gravano appealed the judgment to the Arizona Court of Appeals, repeating his arguments that the forfeiture statute did not apply to the *Underboss* royalties, and that the forfeiture of these proceeds would violate his rights under the Free Speech Clause. *Id.* at 6a-7a. The court rejected these arguments and affirmed the forfeiture. The court held that the statute applied to the *Underboss* royalties because they were traceable to a racketeering offense. *Id.* at 22a (*citing* Ariz. Rev. Stat. Ann. § 13-2314(G)(3)). In support of this conclusion, the court reasoned that, because Gravano's notoriety as a racketeer was what made "his story" marketable, any proceeds related to the telling of that story were traceable to racketeering under the statute. *Id.* at 23a.

In rejecting Gravano's First Amendment argument, the court first concluded that the application of the forfeiture statute to the royalties earned from the telling of Gravano's "story" was unrelated to the content of *Underboss*. The court noted that, pursuant to its construction of the forfeiture statute, the State was entitled to forfeit such royalties whenever "the storyteller's notoriety from racketeering is what makes the story marketable." *Id.* at 14a. The court added that the State would not be entitled to invoke the forfeiture statute to forfeit royalties earned from a book by a notorious racketeer containing descriptions of *non*-racketeering crimes.

See ibid. "Thus," the court concluded, "whether proceeds of an expressive work are forfeitable under the statutory scheme does not depend on the content of the work." *Id.* at 15a.

The court nevertheless went on to hold that the forfeiture survived the strict scrutiny that would apply if the application of the statute were content-based. The court reasoned that the forfeiture statute, in its application to book royalties, was a narrowly tailored means of furthering the State's compelling interests in "preventing racketeers from benefitting from their crimes" and "compensating victims for their losses and the State for costs incurred in the prosecution of racketeers." *Id.* at 20a. The court stressed that the forfeiture statute's application to book royalties did not suffer from the sort of overbreadth that this Court identified in the New York "Son of Sam" law struck down in *Simon & Schuster*, because it applied only to "speech that constitutes the proceeds of racketeering." *Id.* at 19a. On these grounds, the court affirmed the trial court's judgment. *Id.* at 26a.

D. Gravano filed a timely petition for review in the Arizona Supreme Court, which summarily denied the petition. *Id.* at 44a-45a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals decision conflicts directly with this Court's decision in *Simon & Schuster*, as well as with that decision's progeny in other states' courts. Indeed, in *Simon & Schuster* this Court struck down a financial burden on expression that was both less severe and more narrowly tailored to achieve its purposes than the forfeiture that the Court of Appeals upheld here. Moreover, as in *Simon & Schuster*, the question presented in this case is very likely to

recur. Statutes like the one that Arizona applied to forfeit the proceeds from *Underboss* are available not only to Arizona, but also to the United States, twenty-nine other States, and two territories, and the Court of Appeals' strategy for sidestepping *Simon & Schuster* could also be applied in connection with innumerable other forfeiture statutes on the books in every state. Furthermore, as long as the Court of Appeals decision is left unreviewed, it and its progeny will tend to stifle the expression of any speaker who might otherwise undertake, in return for compensation, to engage in speech the content of which might be deemed to be of interest to its potential audience because of the speaker's criminal "notoriety." There is only one proper response to a decision that conflicts so directly with this Court's precedents and threatens so manifestly to result in the content-based burdening of speech: It should be promptly nipped in the bud, by the grant of certiorari and reversal by this Court.

1. Certiorari is appropriate here because the Court of Appeals decision conflicts sharply with this Court's decision in *Simon & Schuster*, *see* Sup. Ct. R. 10(c), as well as with that decision's progeny in other states' courts, *see id.* R. 10(b).

As in *Simon & Schuster*, the forfeiture of book royalties here was expressly motivated and justified with reference to the targeted book's content. The Court of Appeals decision makes this very plain. The pertinent language from the racketeering forfeiture statute entitles the State to forfeit proceeds "traceable to" racketeering offenses. Pet. App. at 22a, 56a-57a. This portion of the statute applied to the proceeds from *Underboss*, the court held, because "the storyteller's notoriety from racketeering is what makes the story marketable." *Id.* at 14a. The basis for the application

of the forfeiture statute was thus the fact that the book's content centered on "the story" of a person who helped to create it — a rationale that would not apply if the book's content did not include his "story." Indeed, the court stressed that a book written by the same "notorious" racketeer but with a different content (descriptions of crimes that do not "fall within the definition of racketeering") would *not* be subject to forfeiture pursuant to the statute. *Ibid.* And the court went on to offer still more content-based guideposts for the application of the statute, specifying that a targeted book's content must not only deal with racketeering crimes, but must describe such crimes more than "tangentially or incidentally," and must not deal with "a mere crime of conscience." *Id.* at 19a.

The only way to determine whether a particular expressive work falls within the court's parameters is to read the work and apply these guideposts to its content. It is thus plain that the Court of Appeals' standard for the forfeitability of book revenues pursuant to the statute is content-based. *See Burson* v. *Freeman*, 504 U.S. 191, 197 (1992) (burden on speech is content-based where it focuses on "speech about crime") (*citing Simon & Schuster*, 502 U.S. at 116); *Opinion of the Justices*, 764 N.E.2d at 348 (if the law's applicability "can only be determined by reviewing the contents of the proposed expression," the law is a content-based regulation of speech); *Curran*, 638 A.2d at 100 (same); *Bouchard*, 694 A.2d at 676 (same). The court did state, in the same passages in which it set forth this standard for the forfeitability of book royalties, that the application of its standard "does not depend on the content of the work." Pet. App. at 15a. But this claim is simply false, as the above-quoted portions of the court's opinion demonstrate. The court

appears to have been focusing here on the fact that the statute's application turns on the identity of the speaker — but this observation does not negate the fact that it *also* focuses on the content of his speech.

Thus, because it places a financial burden on particular speech because of its content, the rule of forfeiture applied to the *Underboss* royalties here can pass First Amendment muster only if the State can show that the burden on speech is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 118 (*quoting Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987)).

The State did not make this showing. The Court of Appeals reasoned that the application of the racketeering forfeiture statute to royalties from an expressive work was narrowly tailored to advance the same state interests that were proffered in support of the "Son of Sam" law struck down in *Simon & Schuster*: "ensuring that victims of crime are compensated by those who harm them," and "ensuring that criminals do not profit from their crimes." Pet. App. at 16a (*quoting Simon & Schuster*, 502 U.S. at 118-19). But the application of Arizona's statute to book royalties suffers from the same fatal overbreadth with respect to these purposes as did the "Son of Sam" law struck down in *Simon & Schuster*.

As applied to royalties from expressive works, Arizona's racketeering forfeiture statute has the key features that led this Court to strike down the New York "Son of Sam" law reviewed in *Simon & Schuster*. First, the Arizona forfeiture statute (as construed by the Court of Appeals) "applies to works on *any* subject" (*Simon & Schuster*, 502 U.S. at 121),

provided only that they include descriptions of racketeering crimes, which are defined very broadly.[1] (While the Court of Appeals stated that such descriptions must be more than "tangential[]" or "incidental[]" (Pet. App. at 19a), this "marginal narrowing" does not obscure the overbreadth problem, because there is no telling how much *other* expression may be subjected to the forfeiture statute on account of its being included in the same expressive work as a more-than-tangential account of a racketeering crime. *Keenan*, 40 P.3d at 733-34 ("there are multiple contexts in which expressive materials, with diverse subjects and themes unrelated to the exploitation of one's crimes, might include substantial accounts of those episodes"); *accord Opinion of*

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1. Arizona defines "[r]acketeering" to include any act that is committed "for financial gain" and that is punishable by imprisonment for more than one year involving any of the following crimes: (a) homicide; (b) robbery; (c) kidnapping; (d) forgery; (e) theft; (f) bribery; (g) gambling; (h) usury; (i) extortion; (j) extortionate extensions of credit; (k) prohibited drugs, marijuana or other prohibited chemicals or substances; (l) trafficking in explosives, weapons or stolen property; (m) participating in a criminal syndicate; (n) obstructing or hindering criminal investigations or prosecutions; (o) asserting false claims including, but not limited to, false claims asserted through fraud or arson; (p) intentional or reckless false statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands; (q) resale of realty with intent to defraud; (r) intentional or reckless fraud in the purchase or sale of securities; (s) intentional or reckless sale of unregistered securities or real property securities; (t) a scheme or artifice to defraud; (u) obscenity; (v) sexual exploitation of children; (w) prostitution; (x) restraint of trade or commerce; (y) terrorism; (z) money laundering; (aa) obscene or indecent telephone communications to minors for commercial purposes; or (bb) counterfeiting marks. Pet. App. at 47a-49a.

the Justices, 764 N.E.2d at 349 n.8.) Second, the application of Arizona's racketeering forfeiture statute to book royalties applies regardless of whether the speaker "was ever actually accused or convicted" of the crime in question. *Simon & Schuster*, 502 U.S. at 121; *see* Pet. App. 47a; *In re 1996 Nissan Sentra*, 32 P.3d 39, 43 (Ariz. Ct. App. 2001).

As with the New York "Son of Sam" law, these aspects of the Arizona law would permit it to be applied to a wide variety of expressive works, including not only the critically-acclaimed recent books *Underboss* and *Wiseguy*,[2] but also such books as *The Autobiography of Malcolm X*,[3] *Scenes in the Life of Harriet Tubman*,[4] *Catch Me If You Can*: *The True*

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2. *See Simon & Schuster*, 502 U.S. at 114 (noting that one critic called *Wiseguy*, which contained extensive accounts of the co-author's participation in racketeering offenses, "the best book on crime in America ever written").

3. This book contains substantial descriptions of Malcolm X's participation for financial gain in prostitution, robbery, burglary, and the sale of illegal drugs. *See Malcolm X and Alex Haley, The Autobiography of Malcolm X* 109-14, 120-21, 129-35 (Random House 1964). *Time* Magazine placed it first in a list of the twentieth century's non-fiction "required reading." *See* Paul Gray, *Required Reading*, Time, Jun. 8, 1998.

4. This account of Ms. Tubman's experiences helping enslaved persons escape to non-slaveholding jurisdictions was written with Ms. Tubman's assistance, and for the purpose of collecting contributions to support her in her later years. *See Sarah H. Bradford, Scenes in the Life of Harriet Tubman* (Introduction) (W.J. Moses 1869). One passage recounts how one of Ms. Tubman's supporters gave her financial assistance while she was participating in these 'thefts.' *See id.* at 51-52.

Story of a Real Fake,[5] *Manchild in the Promised Land*,[6] *The Executioner's Song*,[7] and *The Thief's Journal*,[8] as well as any films or other expressive works derived from these books.[9] Moreover, as with all content-based burdens on

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5. This best-selling book contains extensive descriptions of co-author Frank W. Abagnale's experiences committing crimes including forgery and fraud for financial gain. *See Frank W. Abagnale with Stan Redding, Catch Me if You Can: The True Story of a Real Fake* (Random House 1980).

6. This book contains extensive descriptions of author Claude Brown's involvement for financial gain in crimes including theft, extortion, and sale of illegal drugs. One critic described it as "perhaps the most extraordinary autobiography of the generation." *Claude Brown, Manchild in the Promised Land* i (Penguin Books 1965).

7. This Pulitzer Prize-winning book by Norman Mailer contains descriptions of Gary Gilmore's participation in multiple murders for financial gain. *See Norman Mailer, The Executioner's Song* 223-24, 251-53, 439-42, 799-801 (Little, Brown 1979).

8. This book contains multiple descriptions of author Jean Genet's acts of prostitution and theft. *See, e.g., Jean Genet, The Thief's Journal* 28-29, 44-47 (Grove Press 1964). Jean-Paul Sartre called it "the most beautiful [book] that Genet has written." *Id.* at 8.

9. *Wiseguy* was made into *Goodfellas*, an Academy Award-nominated film directed by Martin Scorcese. Chicago Sun-Times critic Roger Ebert described it as "a great film." Roger Ebert, *Goodfellas*, Chi. Sun-Times, Sep. 2, 1990. *The Autobiography of Malcolm X* was made into *Malcom X*, a film directed by Spike Lee that a Washington Post critic described as "a spiritually enriching testament to the human capacity for change." Rita Kempley, '*Malcolm X*,' Wash. Post, Nov. 18, 1992. *Catch Me If You Can: The True Story of a Real Fake*, was made into *Catch Me if You Can*, a film directed

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expression, the burdens imposed by the application and threatened application of Arizona's forfeiture law to the proceeds of expressive works tends to skew the forum for the discussion of issues of crucial interest to the public. Pursuant to the rule of forfeiture articulated by the Court of Appeals, while the government faces no limitation in broadcasting its own satisfaction with its enforcement of anti-racketeering laws, a person who has been the object of such enforcement actions, and wishes to communicate her view that these laws are unjust or unjustly applied, may do so only if prepared to forfeit to the government any compensation for her efforts.

In fact, the chief differences between the forfeiture here and the escrow invalidated in *Simon & Schuster* make the Arizona forfeiture significantly *less* capable of passing the First Amendment test. The New York statute was both significantly less burdensome on the speaker and significantly more narrowly tailored to achieve a victim-compensation purpose, because it provided that the affected book royalties would only be placed in escrow temporarily, to give victims an opportunity to claim a right to be compensated from them, and that any funds not used for victim compensation would immediately be released to the author as soon as the (five year) escrow period had elapsed. *See Simon & Schuster*, 502 U.S. at 109. Under the Arizona statute, by contrast, book royalties are forfeited to the State completely and permanently, with no mechanism for limiting the

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by Steven Spielberg. A New York Times reviewer characterized the film as "sly social satire." Stephen Holden, *Taking to a Gullible World Like a Mouse to Swiss Cheese*, N.Y. Times, Dec. 25, 2002. *The Executioner's Song* and *Underboss* were made into television movies.

forfeiture to the amount necessary to compensate victims. *See* Pet. App. at 37a, 54a-57a; Ariz. Rev. Stat. §§ 13-4314, 13-4315 (2002). If the New York statute was not sufficiently narrowly tailored to achieve the proffered objectives, then *a fortiori* the Arizona statute is not either. *See Keenan*, 40 P.3d at 731.

Despite these facts, the Court of Appeals held that the Arizona statute (as applied to book royalties) was sufficiently narrowly tailored to survive the First Amendment scrutiny applied to content-based burdens on speech because it forfeited only "the proceeds of racketeering," meaning only works by notorious racketeers containing more than "tangential[]" or "incidental[]" descriptions of racketeering offenses. *Id.* at 19a. This reasoning is flawed for several reasons.

First, even if the court's rationale for treating book royalties as "proceeds of racketeering" could be taken at face value, it would do nothing to remove the fact that the statute, as applied to royalties from expressive works, suffers from the same fatal overbreadth as the law struck down in *Simon & Schuster*. *See supra* at 11-12 and nn.2-9. As demonstrated by the examples set forth above, the law provides for forfeiture with respect to a staggering array of crimes and a virtually unlimited quantity of protected speech. Second, the court's "proceeds of racketeering" theory is misguided. The mere fact that an expressive work incorporates the input of a notorious racketeer and contains more-than-tangential descriptions of his racketeering offenses does not transform any royalties derived from the work into "proceeds of racketeering." *Cf. Simon & Schuster*, 502 U.S. at 119 (reserving the issue). When an author receives compensation for an expressive work that he created or helped to create,

it is his labor in producing the work of expression that is being rewarded. Compensation for an expressive work that includes descriptions of the author's criminal activities is no more the "proceeds of" crime than compensation for an expressive work describing the author's experience suffering from a debilitating disease constitutes "proceeds of" the disease.

Finally, the court's protocol for treating royalties from an expressive work as the "proceeds of crime" involves the State in a form of censorship that is repugnant to the First Amendment. The premise of the court's reasoning is that expressive works that are created by (or with the cooperation of) certain individuals, and that contain crime-descriptions deemed by the State to be more than merely "tangential," may be assumed to be of interest to their potential audience because they contain such descriptions. *See* Pet. App. at 23a. But common sense dictates that even expressive works that meet these criteria may be of interest to their audience for other reasons, such as passages having nothing to do with crimes, or general artistic merit. (Indeed, *Underboss* itself was of interest to a *New York Times* reviewer not for its crime descriptions, but for its character as a "morality play on the subject of loyalty." *Supra* at 3.) Common sense, and basic First Amendment principles, also dictate that the appeal of an expressive work will vary according to each individual audience-member's intellectual and aesthetic tastes. "The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed," and the First Amendment requires the State to recognize "that these judgments are for the individual to make, not for the Government to decree . . . ." *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000).

The Court of Appeals' framework for applying Arizona's racketeering forfeiture statute to royalties derived from expressive works flies in the face of these principles by empowering the State to make judgments as to why a given expressive work is of interest to its potential audience, and to forfeit all compensation for expression that the State deems to be of interest for a particular reason. By applying its judgment in this fashion to impose a financial disincentive to create or publish certain works, the State deprives individuals of the opportunity to decide for *themselves* why particular expressive works interest them, and effectively acts as a censor. This is a role that the First Amendment does not permit the State to play. *Cf. Forsyth County, Georgia* v. *Nationalist Movement*, 505 U.S. 123, 131 (1992) ("If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted") (internal quotation marks and citation omitted); *Opinion of the Justices*, 764 N.E.2d at 351 (noting that a financial burden on speech operated in "practical effect" as a prior restraint).

The Court of Appeals thus erred in concluding that Arizona could sidestep *Simon & Schuster* simply by invoking a non-"Son of Sam" law to forfeit book proceeds. The application of Arizona's racketeering forfeiture statute to the royalties from *Underboss* offends essential First Amendment principles in the same manner as the law struck down in *Simon & Schuster*, and thus the Court of Appeals decision conflicts directly with that decision, as well as with the State-court decisions that have properly applied *Simon & Schuster* to strike down similar attempts to seize the proceeds of expressive works. *See Keenan* v. *Superior Court*

of Los Angeles County; *In re Opinion of the Justices to the Senate*; *Bouchard* v. *Price*; *Curran* v. *Price*, *supra*.

2. Certiorari is also appropriate here because the issue presented is "significant and likely to recur," *Simon & Schuster*, 502 U.S. at 115, and because a failure to reverse the Court of Appeals decision would raise the specter of important expression being eliminated from the "marketplace of ideas" because of its content. *Virginia* v. *Hicks*, 539 U.S. __, __, 123 S. Ct. 2191, 2196 (2003).

The Court of Appeals decision establishes that Arizona may invoke its racketeering forfeiture statute to lay claim to all proceeds derived from an expressive work whose marketability relates to its author's "notoriety" as a racketeer. Pet. App. at 14a. Even if Arizona's racketeering forfeiture statute were *sui generis*, the decision standing alone would tend to muzzle any would-be speaker who: (i) suspects that Arizona might conclude that the story he wants to recount would find a receptive audience because of his "notoriety" in relation to a crime falling within Arizona's broad definition of racketeering (*see supra* note 1); and (ii) cannot rule out the possibility that he, his property, or his money will at some point come within the jurisdiction of Arizona law enforcement authorities. *See* Pet. App. at 54a-55a (*in personam* forfeiture); *id.* at 56a-57a (*in rem* forfeiture). When such circumstances are present, the speaker would have to invest his resources in the project with the knowledge that he may be denied any compensation for his efforts, just as Gravano was here. And it will make no difference where the would-be speaker's crimes occurred or where his victims are located — indeed, it is undisputed that none of the crimes that were part of the story recounted in *Underboss* had any nexus with Arizona, and that the sole basis upon which

Arizona could forfeit Gravano's property was his physical presence in the State. *See id.* at 17a-18a. Thus, even standing alone, the Court of Appeals decision creates a "disincentive to create or publish works with a particular content" (*Simon & Schuster*, 502 U.S. at 118) that extends far beyond Arizona's borders.

But Arizona's racketeering statute is far from *sui generis*. The statute that Arizona applied to forfeit the proceeds of *Underboss* is mirrored by similar statutes giving forfeiture powers to the federal government,[10] twenty-nine other states,[11]

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10. *See* 18 U.S.C. § 1963(a)(3) (LEXIS through P.L. 108-76).

11. *See* Cal. Penal Code § 186.3 (Deering, LEXIS through 2003 Supp.); Colo. Rev. Stat. Ann. §§ 18-17-105; 18-17-106 (West, Westlaw through Chap. 18 1st Reg. Sess.); Conn. Gen. Stat. Ann. § 53-397 (LEXIS through Jan. 6, 2003 Spec. Sess.); Del. Code Ann. tit. 11, § 1506 (LEXIS through 2003 Reg. Sess.); Fla. Stat. § 895.05(2)(a) (LEXIS through 2002 Legis. Sess.); Ga. Code Ann. § 16-14-7 (LEXIS through 2003 Reg. Sess.); Haw. Rev. Stat. Ann. § 842-3 (LEXIS through 2002 Reg. Sess.); Idaho Code § 18-7804(g)(1) (LEXIS through 2003 Sess.); 725 Ill. Comp. Stat. 175/5 (West, Westlaw through P.A. 93-350 of 2003 Reg. Sess.); Ind. Code Ann. §§ 34-24-2-2 – 34-24-2-4 (West, Westlaw through 2003 1st Reg. Sess.); Iowa Code Ann. §§ 706A.3; 809A.4 (West, Westlaw through Chap. 12 of the 2003 Reg. Sess.); Ky. Rev. Stat. Ann. §§ 500.090; 506.120 (West, Westlaw through End of 2003 Reg. Sess.); La. Rev. Stat. Ann. § 1356 (West, Westlaw through 2002 1st Extraord. and Reg. Sess.); Mich. Comp. Laws Ann. §§ 750.159j; 750.159m; *but cf. id.* § 750.159t ("Notwithstanding any provision in this chapter, the prosecuting agency shall not seize materials presumptively protected by the first amendment to the constitution of the United States in a manner that violates that constitutional provision") (West, Westlaw through P.A. 2003,

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Puerto Rico,[12] and the Virgin Islands.[13] Thus, the speech-suppressing effect of the Court of Appeals decision spreads further still, creating a financial disincentive to create or publish works with a particular content for certain would-be speakers who suspect that they or their property may come within the reach of *any* of these jurisdictions.

In fact, the speech-suppressing effect of the Court of Appeals decision extends still more broadly, because nothing about the court's reasoning prevents it from being applied to the broad array of *non*-racketeering forfeiture statutes

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Nos. 178, 180, 181); Minn. Stat. § 609.905 (LEXIS through 2002 Legis.); Miss. Code Ann. § 97-43-9(2) (LEXIS through 2003 Reg. Sess.); Nev. Rev. Stat. Ann. § 207.420 (LEXIS through 2002 Legis.); N.J. Rev. Stat. § 2C:41-3 (LEXIS through P.L. 2003 Chap. 144); N.M. Stat. Ann. § 30-42-4(E) (LEXIS through 2003-NMCA-091 and 2003-NMSC-018); N.C. Gen. Stat. § 75D-5 (LEXIS through 2002 Sess.); N.D. Cent. Code § 12.1-06.1-05(4)(f)(3) (LEXIS through 2003 Gen. and Spec. Sess.); Ohio Rev. Code Ann. § 2923.32(B)(3) (West, Westlaw through 5/29/03); Okla. Stat. tit. 22, § 1405 (LEXIS through 2003 Supp., 2002 Reg. Sess.); Or. Rev. Stat. § 166.725(2) (LEXIS through 2001 Reg. Sess.); R.I. Gen. Laws § 7-15-3(a) (LEXIS through Jan. 2002 Sess.); Tenn. Code Ann. § 39-12-206(b) (LEXIS through 2002 Sess.); Utah Code Ann. § 76-10-1603.5(1) (LEXIS through 2003 1st Spec. Sess.); Wash. Rev. Code Ann. §§ 9A.82.100(4)(f)(iii); 9A.82.100(5)(c) (LEXIS through 2002 Gen. Elec.); Wis. Stat. Ann. § 946.87(2)(a) (LEXIS through 2001-2002 Legis.).

12. *See* 25 P.R. Laws Ann. § 971d(b) (LEXIS through Dec. 2, 2000).

13. 14 V.I. Code Ann. § 606(c) (West, Westlaw through Act 6572 of 2002 Sess. and Acts 6573 through 6575 of 2003 Sess.).

prevalent in the United States Code and the statutes of every state. *See*, *e.g.*, 18 U.S.C. § 982 (West, Westlaw through P.L. 108-99) (money laundering); 21 U.S.C. § 853 (West, Westlaw through P.L. 108-99) (drug related offenses); 18 U.S.C. § 793(h) (West, Westlaw through P.L. 108-99) (espionage); 720 Ill. Comp. Stat. § 5/11-20.1A (West, Westlaw through P.A. 93-450 of the 2003 Reg. Sess.) (keeping a place of juvenile prostitution; child pornography); *id.* § 5/16D-6 (computer crimes); Ohio Rev. Code Ann. § 2925.42 (West, Westlaw through 8/14/03) (drug related offenses); Mo. Ann. Stat. § 513.607(1) (West, Westlaw through First Reg. and Second Extraord. Sess. of 92d Gen. Assemb. (2003)) ("All property of every kind . . . derived from, or realized through criminal activity is subject to civil forfeiture"); *see also* Steffanie Stracke, Comment, *The Criminal Activity Forfeiture Act: Replete With Constitutional Violations*, 57 Mo. L. Rev. 909, 909 & n.3 (1992) ("every state and the District of Columbia has enacted a statute providing for the forfeiture of 'guilty' property") (citing statutes). Indeed, the abundance of statutes that might be applied in the same fashion as the Arizona racketeering forfeiture statute was applied here makes certiorari even more appropriate here than in *Simon & Schuster* itself, where only the narrow category of "Son of Sam"-type laws were implicated by the lower court's decision.

In short, the Court of Appeals decision could make compensation uncertain for virtually all speakers who are considering engaging in expression the content of which a state might determine to be of interest to readers because of the speakers' criminal "notoriety." The only way to remove this uncertainty in any particular jurisdiction would be to press the issue in court. It is a safe assumption that "[m]any persons, rather than undertake the considerable

burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech — harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at __, 123 S. Ct. at 2196 (citation omitted). And even when such a speaker does decide to invest time and effort in an expressive work, he and the publisher will feel considerable pressure to edit the work with a view to steering clear of any possible forfeiture, either by paring down any descriptions of racketeering (or other) crimes to a degree where they could be considered "tangential," or by excising them from the work entirely.

There is no means by which this Court can provide a remedy when books, essays, movies, or other expressive works simply are not created, or are created in a redacted form for fear of a forfeiture action, and there is no telling when the Court's next opportunity to remedy this impairment of the marketplace of ideas may present itself. "Although it is impossible to measure the cost of works that would never come to fruition . . . , 'we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne.' " *Opinion of the Justices*, 764 N.E.2d at 350 (*quoting United States* v. *Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995)). The Court should therefore act now. To cut short this content-based stifling of expression before it begins, the Court should grant certiorari and reverse the Court of Appeals decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE STATE OF ARIZONA, DIVISION ONE FILED DECEMBER 24, 2002

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CV 02-0025

DEPARTMENT B

STATE OF ARIZONA, ex. rel. JANET NAPOLITANO,

Plaintiff-Appellee,

MONA GAROFALO, LAURA GAROFALO, KAREN GAROFALO, CATHERINE COLLUCI, DAWN DeBATT, MICHELLE DeBATT, AND SHIRLEY SHIFFREN,

Intervenors-Appellees,

v.

SALVATORE GRAVANO, aka JIMMY MORAN,

Defendant-Appellant.

1207 E. SECRETARIAT DRIVE, TEMPE, ET AL.,

Defendants-Appellants In Rem.

Filed 12-24-02

Appendix A

Appeal from the Superior Court in Maricopa County

Cause No. CV00-007692

The Honorable Mark R. Santana, Judge

AFFIRMED

OPINION

In this appeal, we consider whether the application of Arizona's forfeiture statutes to royalties from a book about the life and crimes of a convicted racketeer violates constitutional free speech guarantees. We further examine whether the royalties have the causal connection with racketeering required for forfeiture. For the reasons discussed below, we conclude that the statutes are constitutional in this setting and that the royalties are subject to forfeiture as proceeds traceable to racketeering. As a result, we affirm the trial court's judgment ordering forfeiture of the royalties.

FACTUAL AND PROCEDURAL BACKGROUND

On February 24, 2000, appellant Salvatore Gravano, aka "Sammy the Bull," aka Jimmy Moran ("Gravano"), and others were arrested and charged in Maricopa County with state crimes related to the alleged distribution of MDMA, a dangerous drug with the street name of "Ecstasy." Gravano was no stranger to the criminal justice system; in 1991, he pled guilty in federal court in New York to one count of violating the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). *See* 18 U.S.C. § 1962.

Appendix A

Gravano's conviction arose from his participation in the Gambino organized crime family, in which he was involved in racketeering activity, including murder and extortion. As a result of his plea agreement, under which he cooperated with law enforcement in the prosecution of others involved in organized crime, Gravano was sentenced to five years in prison and placed in the federal witness protection program.

Two months after Gravano's arrest in Arizona, the State of Arizona filed a Notice of Pending Forfeiture and Notice of Seizure for Forfeiture relating to property owned by Gravano and the others charged with Ecstasy distribution. Included in items owned by Gravano and subject to forfeiture were money, guns, jewelry, cellular phones, and a vehicle. The State also sought forfeiture of all rights of Gravano "to payment, royalties, receipt of the beneficial interest of any trust, and receipt of any benefit by any means present or future" in connection with the preparation, publication, or promotion of the non-fiction work about Gravano's life that was written by Peter Maas, published by Harper-Collins (UK), Inc., in 1997, and entitled *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia ("Underboss").*

On June 23, 2000, the State filed a civil complaint for racketeering and forfeiture under the Arizona Racketeering Act, Arizona Revised Statutes ("A.R.S.") sections 13-2301 to -2318 (2001 & Supp. 2002), and the Arizona Forfeiture Reform Act, A.R.S. §§ 13-4301 to -4316 (2001 & Supp. 2002). The State alleged that proceeds of participation in the Gambino organized crime family were used to acquire or maintain control of four businesses in Arizona, including Southwest Ecstasy Enterprise ("SEE"), and that SEE was

conducted through racketeering, principally by the manufacture and distribution of Ecstasy. The State sought, among other relief, monetary judgments and orders forfeiting the defendants' property.

Meanwhile, in Gravano's criminal case, Gravano asked the court for guidance regarding royalty income from *Underboss* that was to be released to him.[1] The court in this forfeiture action subsequently ordered Gravano to cause the *Underboss* royalties to be deposited with the clerk of the superior court, and Gravano complied.

Gravano moved for dismissal of the portion of the complaint that sought forfeiture of the *Underboss* earnings. He argued that seizure of the *Underboss* proceeds would violate the First Amendment to the United States Constitution, that the book royalties were not proceeds traceable to racketeering, that the civil forfeiture statutes could not be invoked to seize the royalties because no injured

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1. The *Underboss* royalties had been withheld from Gravano pending final judgment in a case brought against him, Maas, the publisher, and others by the New York State Crime Victims Board under New York's revised "Son of Sam" law. The trial court in New York ruled that proceeds from sales of the book were not forfeitable in favor of victims of Gravano's crimes because the law applied only to state court convictions – and Gravano was convicted in federal court. *See N. Y. State Crime Victims Bd. v. T.J.M. Prods., Inc.*, 705 N.Y.S.2d 320, 322 (2000). That ruling was affirmed on appeal. *Id.* at 326. We note that, in this case, the State is *not* proceeding under the authority of Arizona's version of the "Son of Sam" law, A.R.S. § 13-4202 (Supp. 2001).

person had filed a request for compensation or to intervene,[2] and that the State could not recover the book proceeds under a theory of "substitute assets" because to do so would violate his Sixth Amendment right to counsel in the criminal case against him.

The trial court denied the motion. The court found that the *Underboss* proceeds were traceable to racketeering because "the proceeds would not exist were it not for Mr. Gravano's criminal activities in New York" and because those activities would also violate Arizona's racketeering laws. The court further noted that the forfeiture statutes allowed the State to seize any property that constituted the proceeds of racketeering and, thus, the statutes were not directed solely at published works. The forfeiture statutes, said the court, "provide for full due process before the deprivation of property" and "are content neutral and narrowly drawn." The court concluded that, to the extent application of the forfeiture statutes impact the First Amendment, the laws are justified by compelling state interests and no less restrictive alternative is available. The court also ruled that Gravano's Sixth Amendment rights did not prevail over the forfeiture action and that qualified individuals had timely intervened and asserted a claim to the funds. Finally, in light of its rulings, the court found it unnecessary to address the issue whether the book proceeds could serve as "substitute assets."

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2. Before the trial court ruled on the motion for partial dismissal, seven victims of Gravano's New York crimes moved to intervene in this forfeiture action.

The State then moved for partial summary judgment regarding the proceeds of *Underboss*. The State argued that the nexus between Gravano's racketeering and income from the book contract had been established by the court's ruling and that the resulting remedies were mandated by the forfeiture statutes. The State also requested an order forfeiting the book royalties on deposit with the court to the State, subject to the property interests of the interveners. Gravano objected to the motion and alleged that material issues of fact existed that should preclude summary judgment, but did not file a separate statement of facts or otherwise submit admissible evidence controverting the facts asserted by the State.

The trial court granted the State's motion for partial summary judgment. The court ordered that the royalties be forfeited to the State, and the court directed the State to attempt to locate and identify persons injured by Gravano's racketeering activities in New York. Gravano timely appealed from the judgment. We have jurisdiction to decide this appeal pursuant to A.R.S. § 12-120.21(A) (1) (1992).

ISSUES

Gravano presents the following issues on appeal:

I. Does forfeiture of the *Underboss* royalties violate the First Amendment to the United States Constitution and Article 2, Section 6, of the Arizona Constitution?

II. Are the *Underboss* royalties "proceeds traceable to" racketeering as defined in A.R.S. § 13-2314 (2001)?

III. Does the State have jurisdiction to seize the *Underboss royalties?*

DISCUSSION

I. The First Amendment

Gravano contends that application of the civil forfeiture statutes to the proceeds of *Underboss* violates the First Amendment and the comparable provision in the Arizona Constitution – Article 2, Section 6. Whether a statute is constitutional as applied is a question of law that we review *de novo. State v. Evenson*, 201 Ariz. 209, 212, ¶ 12, 33 P.3d 780, 783 (App. 2001) (review granted in part Apr. 25, 2002); *In re United States Currency in the Amount of $315,900.00*, 183 Ariz. 208, 211, 902 P.2d 351, 354 (App. 1995). Legislative enactments are presumed to be constitutional; the party challenging the validity of a statute has the burden of overcoming that strong presumption. *State v. Tocco*, 156 Ariz. 116, 119, 750 P.2d 874, 877 (1988).

Arizona Revised Statutes § 13-2314 (A) provides,

> The attorney general or a county attorney may file an action in superior court on behalf of a person who sustains injury to his person, business or property by racketeering . . . for the recovery of treble damages and the costs of the suit,

> including reasonable attorney fees, or to prevent, restrain, or remedy racketeering. . ..

Following a determination of liability, the superior court can order various remedies, including " [p]ayment to the general fund of the state or county as appropriate of an amount equal to the gain that was acquired or maintained through an offense included in the definition of racketeering." A.R.S. § 13-2314 (D)(7). The Arizona attorney general may also bring an *in rem* action for forfeiture of "[a]ny property or interest in property acquired or maintained by a person in violation of § 13-2312"[3] and "[a]ll proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities and other property used or intended to be used in any manner or part to facilitate the commission of the offense." A.R.S. § 13-2314(G)(1), (3).

Under this statutory scheme, "racketeering" is defined as

> any act, including any preparatory or completed offense, that is committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state and that would be punishable by imprisonment for more

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3. Arizona Revised Statutes § 13-2312 (2001) concerns the illegal control and conducting of an enterprise through racketeering or its proceeds.

> than one year, regardless of whether such act is charged or indicted, involving [a list of crimes including, among others, homicide, robbery, theft, bribery, gambling, extortion, and participating in a criminal syndicate].

A.R.S. § 13-2301(D)(4) (2001) (current version in Supp. 2002, *as amended by* 2002 Ariz. Sess. Laws, ch. 219, § 9). For the purposes of A.R.S. § 13-2314, the word "proceeds" is defined as "any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form." A.R.S. § 13-2314(N)(3).

Gravano argues that application of these forfeiture statutes to seize his royalties from *Underboss* violates the guarantee of freedom of speech contained in the United States and Arizona constitutions because (A) the forfeiture statutes as applied to the royalties are not content-neutral, (B) the State lacks a necessary "compelling state interest" to justify the impingement on Gravano's First Amendment rights, and (C) even if the State has a compelling interest, the forfeiture laws are not narrowly tailored to achieve that interest. We address these arguments in turn.

A. The Forfeiture Statutes are Content-Neutral.

The threshold question is whether the laws that call for forfeiture of book royalties are content-based, because "[statutory limitations on free speech are subject to varying levels of scrutiny, depending on whether the limitation is content-based or content-neutral." *Evenson*, 201 Ariz. at 212,

¶ 13, 33 P.3d at 783. Gravano argues that the forfeiture of his book royalties imposes a financial burden on him solely because of the content of *Underboss*. He maintains that the State's attempt to seize the royalties is motivated by its disapproval of the content of the book, which depicts Gravano's life in organized crime. Gravano relies on *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), to support his arguments.

In *Simon & Schuster*, the United States Supreme Court examined the constitutionality of New York's "Son of Sam" law.[4] *Id.* at 108. The law targeted any entity that contracted with an accused or convicted person to produce a depiction of the crime the person had committed or the person's thoughts, feelings, opinions, or emotions regarding the crime by way of several identified works, including a movie, book, magazine article, or radio or television presentation. The law required that the entity submit a copy of the contract to the New York State Crime Victims Board ("the Board") and turn over any income under that contract to the Board. *Id.* The Board was then required to deposit the funds in an escrow account, from which victims of the accused or convicted person could recover after obtaining a money judgment for damages against that person in a civil action. *Id.* The law defined the term "person convicted of a crime" as including

4. The "Son of Sam" term for the law came from the name by which David Berkowitz, a serial killer in New York in 1977, was known. *Simon & Schuster*, 502 U.S. at 108. Acting to prevent Berkowitz from profiting from his notoriety while his victims and their families were left uncompensated, the New York legislature enacted the statute that was commonly called the "Son of Sam" law. *Id.*

"any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." *Id.* at 110.

The publisher in *Simon & Schuster* contracted to finance and publish a book in which Henry Hill told the story of his organized crime career. *Id.* at 112-13. After the Board learned of the publication of the book, it determined that all monies paid or owed to Hill under the contract were subject to the provisions of the "Son of Sam" law. *Id.* at 114-15. The publisher sued the Board, seeking a declaration that the law violated the First Amendment. *Id.* at 115.

The *Simon & Schuster* Court noted at the outset that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Id.* (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)). The Supreme Court further noted that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Id.* at 116 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)). The Court determined that the "Son of Sam" law was a content-based statute because it "single[d] out income derived from expressive activity for a burden the State place[d] on no other income, and it [wa]s directed only at works with a specified content." *Id. See also Keenan v. Superior Court*, 40 P.3d 718, 729 (Cal. 2002) (concluding that California's "Son of Sam" law establishes a financial disincentive to create or publish works with a particular content and thus is a content-based regulation of speech).

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). If a regulation serves purposes unrelated to the content of the expression, it is neutral, even if it incidentally affects some speakers or messages but not others. *Id.* "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.' " *Id.* (emphasis added to original omitted) (quoting *Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Supreme Court has cautioned, however, that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994).

The State argues that we need not examine whether the forfeiture statutes are content-based because the First Amendment does not apply to those statutes. In support, it cites *Alexander v. United States*, 509 U.S. 544, 551 (1993), in which the United States Supreme Court observed that, in the case before it, assets were forfeited under RICO not because they were believed to be obscene but because they were related to Alexander's past racketeering violations. "The RICO forfeiture statute," explained the Court, "calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise. The statute is oblivious to the expressive or nonexpressive nature of the assets forfeited; books, sports cars, narcotics, and cash are all forfeitable alike under RICO." *Id.*

We disagree with the State that *Alexander* precludes further analysis. Even if the forfeiture statutes at issue can be said to be oblivious to the expressive nature of the royalties, seizure of the royalties nonetheless burdens Gravano's First Amendment rights. The work from which the royalties arise is expressive in nature and, even if the forfeiture laws are content-neutral, the financial disincentive the laws may have on creating or publishing works that present a picture of a life of crime "may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster*, 502 U.S. at 116. Therefore, Arizona's forfeiture statutes, as applied here, implicate First Amendment concerns. Consequently, we must examine the statutes to determine whether they are content-based or content-neutral.

"As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner*, 512 U.S. at 643. "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Id.* The State argues that Arizona's racketeering forfeiture statutes are not based on the ideas or views expressed in a work, on the work's subject matter or medium of expression, or even on whether any type of expression is involved.

Whether a statute's burden on expression is content-based turns on its primary purposes rather than its incidental effects; "statutes [a]re content-neutral where they [a]re intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers

but not others." *Simon & Schuster*, 502 U.S. at 122 n.*. "Content," in the constitutional sense, refers to the particular ideas or viewpoints that are expressed. *Ariz. Dep't of Revenue v. Great W. Publ'g, Inc.*, 197 Ariz. 72, 78, ¶ 23, 3 P.3d 992, 998 (App. 1999).

Arizona's forfeiture statutes contain no reference to the content of speech or expressive materials. As the State suggests, the purposes of these statutes apparently include removing the economic incentive to engage in racketeering, reducing the financial ability of racketeers to continue to engage in crime, preventing unfair business competition by persons with access to crime proceeds, compensating victims of racketeering, and reimbursing the State for the costs of prosecution. These purposes are speech- and content-neutral, and any effect on speech is incidental.

Furthermore, the forfeiture statutes as applied here are content-neutral. The forfeiture laws come into play based on the existence of a causal connection between racketeering and property. As the State asserts, when forfeiture of book proceeds is sought, the causal connection between racketeering conduct and the proceeds is present if the commercial value of the book contract is substantially the result of racketeering. In other words, a causal connection exists if the storyteller's notoriety from racketeering is what makes the story marketable. In contrast, a causal connection to racketeering may be absent even if a work includes a description of crimes, if the crimes do not fall within the definition of racketeering or do not enhance the story's or

the storyteller's commercial value.[5] Thus, whether proceeds of an expressive work are forfeitable under the statutory scheme does not depend on the content of the work, and the *Underboss* royalties owed to Gravano may be subject to forfeiture regardless of the message conveyed in the book if a causal connection between racketeering and the proceeds exists. Accordingly, the forfeiture statutes as applied here are content-neutral.

B. Although Not Required, Compelling State Interests are Served by the Forfeiture Statutes.

The most exacting scrutiny is applied to regulations that suppress, disadvantage, or impose different burdens on speech because of its content. *Turner*, 512 U.S. at 642. Under this heightened standard, "[i]n order to justify such differential treatment, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Simon & Schuster*, 502 U.S. at 118 (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)). On the other hand, content-neutral regulations are subject to an intermediate level of scrutiny because, in general, "they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner*, 512 U.S. at 642. Thus, statutes that place only an incidental burden on free speech do not violate the First Amendment "if they further 'an important or substantial governmental interest; if the governmental interest is unrelated to the

5. In this case, counsel for Gravano conceded at oral argument that the commercial value of *Underboss* was enhanced by Gravano's criminal history and notoriety.

suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' " *Ariz. Libertarian Party v. Schmeral*, 200 Ariz. 486, 490-91 n.3, ¶ 13, 28 P.3d 948, 952-53 n.3 (App. 2001) (quoting *Martin v. Reinstein*, 195 Ariz. 293, 320-21, ¶ 98, 987 P.2d 779, 806-07 (App. 1999)[6]).

Although in this case the State need only show an important or substantial governmental interest in the forfeiture statutes, the State argues that it can show compelling interests. In *Simon & Schuster*, the Supreme Court noted (and at oral argument, counsel for Gravano conceded) that "[t]here can be little doubt . . . that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them." 502 U.S. at 118. In addition, said the Court, states have "an undisputed compelling interest in ensuring that criminals do not profit from their crimes." *Id.* at 119. The Court recognized the equitable principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Id.* (quoting *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889)). The Supreme Court also noted that "[t]he force of this interest is evidenced by the State's statutory provisions for the forfeiture of the proceeds and instrumentalities of crime." *Id.*

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6. *Martin* cited *United States v. Albertini*, 472 U.S. 675, 687-88 (1985), which quoted *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Gravano argues, however, that the State of Arizona lacks compelling interests in his case because the royalties come from a book based on activities and crimes perpetrated and prosecuted in New York, and the victims do not live in Arizona. The State responds that the location of the crime or the victims does not lessen the State's interest in the proceeds of the offense, in part because organized crime is a national problem that can be controlled most effectively if states are able to enforce their own laws to benefit a nationwide effort.

In *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 597, 667 P.2d 1304, 1312 (1983), the Arizona Supreme Court rejected the argument that the Arizona attorney general was without authority to redress racketeering wrongs committed against non-residents of Arizona. Our supreme court noted that nothing in A.R.S. § 13-2314(A) restricted the State to protecting only residents of Arizona. *Id.* We acknowledge that, in *Pickrell*, the injuries suffered by the out-of-state residents resulted from wrongs committed, at least in part, by Arizona enterprises. *See id.* Nevertheless, our supreme court's statement, that the fact that Arizona "is willing to provide aid in redressing these wrongs [on behalf of out-of-state residents] is evidence that the state is serious in its fight to eradicate organized crime," *id.*, lends support to the position that Arizona has a compelling interest in assisting out-of-state racketeering victims when the person who victimized them has become an Arizona resident.

Furthermore, the State has a compelling interest in reducing the economic power of criminals and criminal enterprises that come into Arizona, regardless of where their racketeering proceeds originated. The effectiveness of

forfeiture laws in addressing racketeering crimes would be greatly diminished if all that a person had to do to escape forfeiture would be to take such proceeds from the state in which the crime was committed to another state. Likewise, a victim of a racketeering crime has little remedy if the racketeer can avoid forfeiture by moving himself or herself, or the property, across the state line. In fact, Arizona's definition of racketeering includes acts that are committed in other states that would be chargeable or indictable under Arizona law, thus indicating that the legislature intended Arizona's remedial statutes to reach beyond crimes committed only in Arizona. *See* A.R.S. § 13-2301 (D) (4). We therefore conclude that Arizona has a compelling interest in ensuring that victims of crime are compensated and in ensuring that criminals do not profit from their crimes when the criminal has relocated to Arizona, even if the victims do not reside in Arizona and the crimes were committed elsewhere.

C. The Forfeiture Laws are Narrowly Tailored.

We next consider whether the forfeiture laws' incidental restriction on freedom of speech is no greater than is essential to the furtherance of the State's compelling interests. *See Schmeral*, 200 Ariz. at 490-91 n.3, ¶ 13, 28 P.3d at 952-53 n.3. In *Simon & Schuster*, the United States Supreme Court addressed a similar question under the "narrowly tailored" standard and concluded that New York's "Son of Sam" law was "significantly overinclusive" because it applied to works on any subject that expressed the author's thoughts or recollections about his crime, even tangentially or incidentally, and its broad definition of the phrase "person

convicted of a crime" caused the escrow of income of any author who admitted in his work to having committed a crime, even if he or she had never been accused or convicted of the crime. 502 U.S. at 121. The State argues that these concerns do not apply to Arizona's forfeiture laws. We agree.

Arizona's forfeiture statutes apply only to the proceeds of racketeering. Therefore, the statutes affect only speech that constitutes the proceeds of racketeering – in furtherance of the State's compelling interests. Forfeiture should not occur if the expressive material mentions a crime only tangentially or incidentally; Arizona's law is based on a causal connection with racketeering, not just a mention of it in an expressive work. The *Simon & Schuster* Court criticized the "Son of Sam" law because, under the law, " [s]hould a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author's creditors." 502 U.S. at 123. That is not the factual scenario we face here, and this outcome, in all likelihood, would not be possible under Arizona's forfeiture laws. Additionally, the Supreme Court's concern that the "Son of Sam" law would encompass works by persons who committed crimes of civil disobedience and crimes related to campaigns for civil rights, *id.* at 121-22, does not apply to the forfeiture laws because forfeiture is available only when a racketeering crime is involved and the expressive work has a causal connection with racketeering. As the State notes, a mere crime of conscience would not trigger a racketeering remedy.

Furthermore, the forfeiture laws afford full due process before depriving a person of his or her property. In *Opinion of the Justices to the Senate*, 764 N.E.2d 343, 351-52 (Mass. 2002), the Massachusetts Supreme Court found that a proposed "Son of Sam"-type law violated the First Amendment, in part because the seizure of the proceeds of written work was determined by a non-judicial body in a decision that was final unless the contracting party sought judicial review. The contracting party then had the burden of demonstrating error under a standard that gave deference to the agency's decision. *Id.* at 352. In contrast, Arizona's forfeiture laws require the State to file an action in court and to prove the underlying racketeering and the connection between the racketeering and the property subject to forfeiture. The burden of proof is on the State, and civil procedural rules are applied. Therefore, the due process concerns expressed by the Massachusetts Supreme Court are not present in Arizona's forfeiture statutes.

In sum, the application of Arizona's forfeiture laws is limited to preventing racketeers from benefitting from their crimes, and to compensating victims for their losses and the State for costs incurred in the prosecution of racketeers. We conclude that Arizona's forfeiture statutes not only survive intermediate scrutiny, but also are narrowly tailored to further the compelling interests of the State, and therefore satisfy a strict statutory standard as well. We therefore hold that Arizona's forfeiture statutes, as applied to Gravano's

royalties from *Underboss*, do not violate either federal or state freedom of speech provisions.[7]

II. The Proceeds of Racketeering

Gravano argues that the *Underboss* proceeds are not subject to the forfeiture provisions of A.R.S. § 13-2314(G)(1) and (3), because the contract royalties are the product of his lawful labor in working with the author of the book and the connection between the royalties and the commission of racketeering acts is incidental or fortuitous. We review *de novo* the trial court's interpretations of A.R.S. § 13-2301, the statute defining "racketeering," and A.R.S. § 13-2314(G), the racketeering forfeiture statute. *In re 1996 Nissan Sentra Vin: 1N4AB41D1TC74220 Az Lic: 162ARH*, 201 Ariz. 114, 117, ¶ 8, 32 P.3d 39, 42 (App. 2001).

The State's motion for partial summary judgment was based primarily on A.R.S. § 13-2314 (G), which provides for the forfeiture of any property or interest in property acquired or maintained by a person in violation of racket-

7. The Arizona Constitution provides greater speech rights than the United States Constitution. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354, 773 P.2d 455, 459 (1989). However, that greater protection "lies in the Arizona Constitution's extension of free speech rights to cover not only speech limitations imposed by the government, but also speech limitations emanating from other sources." *Evenson*, 201 Ariz. 209, 218 n.15, ¶ 33, 33 P.3d 780, 789 n.15. Accordingly, we believe our analysis of the forfeiture laws under federal constitutional principles is equally applicable to and adequately supports the constitutionality of these statutes under Article 2, Section 6, of the Arizona Constitution.

eering enterprise laws, and the forfeiture of all proceeds traceable to an offense included in the definition of racketeering. *See* A.R.S. § 13-2314(G)(1), (3). The State identifies the property in question as the contract rights received by Gravano under his agreement to collaborate in the publication of *Underboss*. The racketeering conduct relevant to the forfeiture complaint includes the acts of murder and extortion that Gravano admitted as part of his 1991 plea agreement.

Although the State argues that both paragraphs (1) and (3) of subsection (G) provide for forfeiture of the *Underboss* royalties, we conclude that it is paragraph (3) that supports the trial court's order of forfeiture. This provision concerns "[a]ll proceeds traceable" to a racketeering offense. As we noted earlier, the word "proceeds" is broadly defined as including "any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form." A.R.S. § 13-2314(N)(3). Gravano's rights under his contract qualify as "property" under A.R.S. § 13-105(32) (2001), which defines the word "property" as "anything of value, tangible or intangible."

Under these statutory definitions, the royalties are proceeds of racketeering because they were "caused by" or, in other words, resulted from Gravano's racketeering acts, at least indirectly. The phrase "caused by" involves a causal relationship between conduct and result, which A.R.S. § 13-203(A) (2001) explains as follows:

> **A.** Conduct is the cause of a result when both of the following exist:

> 1. But for the conduct the result in question would not have occurred.
>
> 2. The relationship between the conduct and result satisfies any additional causal requirements imposed by the statute defining the offense.

Because A.R.S. § 13-2314 does not contain any additional causal requirements relevant here, causation of the proceeds is determined by the "but for" test of § 13-203(A)(1).

We agree with the State that Gravano would not have acquired the contract rights and resulting royalties "but for" his racketeering activities. At oral argument, counsel for Gravano conceded that there was a "substantial connection" between Gravano's criminal activities in New York and the resulting notoriety, and the book contract offered by the publisher, HarperCollins (UK), Inc. Without question, it was Gravano's notoriety from that conduct that made his story marketable and of commercial value. Although arguably the causation here is indirect, the definition of "proceeds" allows for such indirect causation. Therefore, a causal connection exists between Gravano's racketeering activities, the book contract, and the fruits of that contract.

Also, the fact that Gravano contributed effort that was not directly unlawful to the book does not take the royalties out of the reach of the forfeiture statutes. A similar argument was made in *United States v. DeFries*, 129 F.3d 1293, 1312-13 (D.C. Cir. 1997), in which union officials who gained office through ballot tampering argued that their salaries should not be forfeited under RICO forfeiture

provisions, because the government had failed to establish an adequate causal link between the ballot tampering and the electoral wins that afforded them their salaries. The circuit court noted that the district court's findings could sustain the necessary causal inference and concluded that the officials could not contest that "but for" the elections tainted by racketeering activity, they would not have received their salaries. *Id.* at 1313.

Similarly, even if Gravano earned his book royalties by his effort in the same manner that the union officials earned their salaries by their work, "but for" Gravano's racketeering activities, he would not have been in the position to enter into the contract that called for him to expend the effort to earn the royalties. What Gravano proposes amounts to an exclusive cause test that would prevent forfeiture if any legal act contributes to proceeds that also have a racketeering cause. Such a test would largely negate the effect of forfeiture provisions in situations in which racketeering proceeds are funneled into and used by a lawful business or in which, for example, a company involved in a legal business is also engaged in extortion. An exclusive cause test is not supported by our statutes and, therefore, Gravano's efforts do not break the causal connection necessary for the proceeds of the book to be forfeitable.

III. Jurisdiction Over the Property

Gravano also asserts that the State lacks jurisdiction over the *Underboss* royalties. He maintains that this is so because Arizona has no connection with his crimes, the victims and their families, or the publication of the book.

Appendix A

In the State's statement of facts supporting its motion for partial summary judgment, the State declared,

> The Superior Court in and for Maricopa county has jurisdiction to enter appropriate orders both prior to and following a determination of liability pursuant to A.R.S. § 13-2314, including forfeiture orders pursuant to A.R.S. §§ 13-2314 and 13-4301, *et. seq.*, particularly 13-4302.

Gravano did not directly controvert this statement in the trial court.

Under the heading of "Jurisdiction," A.R.S. § 13-4302 (2001) provides,

> The state may commence a proceeding in the superior court if the property for which forfeiture is sought is within this state at the time of the filing of the action or if the courts of this state have in personam jurisdiction of an owner of or interest holder in the property.

Because Gravano was a resident of Arizona at the time the forfeiture proceeding was filed, the courts of this state had *in personam* jurisdiction over him.

Additionally, an Arizona trial court generally has *in rem* jurisdiction over property that is located in Arizona. *See In re Approx. $50,000.00 in United States Currency*, 196 Ariz. 626, 629, ¶ 7, 2 P.3d 1271, 1274 (App. 2000). The proceeds are in Arizona and came here only after Gravano requested

direction from the court and represented that he would follow such direction. Furthermore, because the property at issue consists of, and has its genesis in, Gravano's rights under the book contract, which are intangible property, such property was located in Arizona because Gravano was a resident here. *See Kelly v. Bastedo*, 70 Ariz. 371, 377, 220 P.2d 1069, 1073 (1950) (concluding that the site of intangibles is with the owner). Therefore, the courts of Arizona have jurisdiction over this forfeiture proceeding.

CONCLUSION

Arizona's forfeiture statutes as applied to Gravano's book royalties do not violate the free speech guarantees of the United States and Arizona constitutions. Furthermore, the proceeds of the book contract are subject to forfeiture because they are casually connected to Gravano's racketeering crimes. The judgment of the trial court is affirmed.

_____

LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____

PHILIP HALL, Presiding Judge

_____

EDWARD C. VOSS, Judge

APPENDIX B — MINUTE ENTRY OF THE SUPERIOR COURT OF ARIZONA MARICOPA COUNTY FILED APRIL 3, 2001

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT
FORM V000

D. Glab
Deputy

FILED: APR 03 2001

04/03/2001

HONORABLE MARK R. SANTANA

CV 2000-007692

STATE OF ARIZONA

v.

SALVATORE GRAVANO ET AL

MINUTE ENTRY

Defendant Salvatore Gravano's Motion for Partial Dismissal Re: Book Proceeds is denied.

Defendant asserts that *Simon & Schuster, Inc. v Members of the New York Crime Victims Board*, 502 U.S. 105, 112

S.Ct. 501, 116 L.Ed.2d 476 (1991), mandates dismissal of the State's forfeiture action with respect to the proceeds this defendant has derived from the book "Underboss". In *Simon & Schuster, supra*, the Supreme Ccurt struck down New York's "Son of Sam" law because that statute specifically required that an accused or convicted criminal's income from published works be made available to victims of crime and other creditors of the criminal. The New York statute applied solely to speech. 112 S.Ct. *at* 505-06. Moreover, the statute applied not only to anyone convicted of a crime, but any person who had voluntarily admitted a criminal act, even if that person had not been prosecuted. Thus, the statute impacted the First Amendment publication rights of every individual who had committed a crime, no matter how minor or distant in the past. *Id. at* 511. The Court concluded that the Son of Sam law was unconstitutional because ". . . New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income." *Id. at* 512.

In this matter, the State of Arizona is utilizing the state racketeering forfeiture statutes, A.R.S. §§ 13-2314 and 13-4301 *et seq.* to seize the assets of Mr. Gravano that result from the defendant's criminal activity. The Court finds that the "Underboss" proceeds are traceable to racketeering in this matter; the proceeds would not exist were it not for Mr. Gravano's criminal activities in New York. Those activities also violate Arizona's racketeering laws. Arizona's forfeiture statutes are not directed solely at published works or the income derived from published works. Rather, these are general forfeiture statutes allowing the state to seize any property that is the proceeds of racketeering. The statutes

provide for full due process before the deprivation of property, ensuring that only individuals who have violated Arizona's racketeering laws will have their publication rights adversely impacted. Only acts of racketeering and the proceeds of racketeering are affected. The Arizona forfeiture statutes are content neutral and narrowly drawn, relating only to racketeering violations.

To the extent that Arizona's forfeiture statutes do indirectly impact Mr. Gravano's right of free speech, the existence of those statutes is justified by compelling state reasons and there is no less restrictive alternative. Depriving criminals the profits of their crimes, using those funds to compensate victims, and ensuring that Arizona does not become a haven for the illegal proceeds of racketeering constitutionally justifies the forfeiture of the "Underboss" proceeds. To deprive a criminal the use of their ill-gotten gains, there simply is no less restrictive alternative means than to forfeit the criminal's possession of those gains. *Simon & Schuster* clearly indicates that compelling state reasons, when combined with a content neutral, narrowly tailored law, permit a forfeiture action against book proceeds that derive from criminal activity. 112 S.Ct. *at* 512.

Moreover, this forfeiture action is not directed toward impacting defendant's First Amendment rights. The State's forfeiture statute asserts claims against a variety of property resulting from this defendant's alleged criminal activities, including the proceeds from "Underboss". *See State's Complaint, Appendix One*. Because the forfeiture is clearly aimed at "other income" and does not single out the "Underboss" proceeds, it is distinguishable from the confiscatory

actions that were held unconstitutional in *Simon & Schuster. See United States v. Branch*, 91 F.3d 699 (5th Cir. 1996); *United States v. Jackson*, 978 F.2d 903 (5th Cir. 1992).

The Court also finds that Mr. Gravano's Sixth Amendment rights do not prevail over this forfeiture action with respect to the use of "Underboss" proceeds to pay Mr. Gravano's attorney fees. A forfeiture statute, which provides no exception for property used to pay attorney fees, does not impermissibly burden a defendant's right to retain counsel of his choice *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2667, 105 L.Ed. 2d 528 (1989).

Finally, the Court finds that individuals have timely intervened and asserted a claim to these funds.

Because the Court finds that this forfeiture action is a lawful act against proceeds resulting from criminal activity that violates Arizona's racketeering laws, the Court does not address the issue of whether the book proceeds can serve as "substitute assets."

IT IS ORDERED continuing this matter on the inactive calendar until September 5, 2001.

APPENDIX C — ORDER RE: FORFEITURE OF "UNDERBOSS" ROYALTIES AND RELATED PROPERTY THAT IS PROCEEDS OF RACKETEERING OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED OCTOBER 23, 2001

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

NO. CV 2000-007692

STATE OF ARIZONA *ex rel,* JANET NAPOLITANO,

Plaintiff,

v.

SALVATORE GRAVANO a.k.a. JIMMY MORAN; DEBRA GRAVANO, GERALD GRAVANO, KAREN GRAVANO, ANTHONY CHINN, MICHAEL DAHLING, ANTHONY DELAVINA, JOVAN ISAILOVIC, MICHAEL PAPA, ANTHONY SALINAS, DAVID SEABROOK, JUAN CARLOS TORO, ANDRE WEGNER, AND THEIR RESPECTIVE SPOUSES, JOHN/JANE DOES 1-5, MORAN INVESTMENTS, INC., MARATHON DEVELOPMENT LLC, UNCLE SAL'S, INC. d.b.a UNCLE SAL'S ITALIAN RISTORANTE, AND JOHN/JANE DOES 6-10; ABC ENTERPRISES 1-5; DEF PARTNERSHIPS 1-5; GHI LIMITED LIABILITY COMPANIES 1-5; JKL TRUSTS AND XYZ CORPORATIONS 1-5;

Defendants,

Appendix C

1207 E. SECRETARIAT DRIVE, TEMPE, *ET AL.*, AS PARTICULARLY DESCRIBED IN APPENDIX ONE HERETO AND MORE PARTICULARLY DESCRIBED IN ITS ATTACHMENTS

Defendants *In Rem.*

ORDER RE: FORFEITURE OF "UNDERBOSS" ROYALTIES AND RELATED PROPERTY THAT IS PROCEEDS OF RACKETEERING

(Honorable Mark R. Santana)

The State of Arizona having obtained an order requiring Salvatore Gravano to cause all assets derived from the rights described in the Notice of Pending Forfeiture, Item Number 091P, and more particularly described in the attachments thereto, particularly "Attachment Relating to Item Number 091P — Property Rights to Publications and Movie," (hereafter described as the "Underboss" proceeds), to be transferred to the Clerk of the Superior Court for Maricopa County; Claimant Salvatore Gravano having made a Motion for Partial Dismissal on the ground that the forfeiture of this property is not supported by the statutes and that, if it were, the forfeiture would violate the constitutional rights of Claimant Gravano; the State having made a Motion for Partial Summary Judgment seeking the forfeiture of this property; this Court having heard and considered both motions and having denied Claimant Gravano's motion and granted the State's Motion for Partial Summary Judgment; and having authorized the State to apply for costs and expenses in

connection with this order; the Court makes the following FINDINGS OF FACT:

1. This action is brought pursuant to the Arizona Racketeering Act, A.R.S. §§ 13-2301, *et seq.*, and the Arizona Forfeiture Reform Act, A.R.S. § 13-4301, *et seq.* ***Complaint, ¶ 1;***

2. Under the Arizona Racketeering Act and the Arizona Forfeiture Reform Act, the Attorney General is empowered to bring a civil action to enforce their provisions to prevent, restrain or remedy racketeering as defined by A.R.S. § 13-2301(D)(4), or a violation of A.R.S. § 13-2312, including remedy racketeering, as defined by A.R.S. § 13-2301(D)(6) by obtaining civil judgments, including forfeitures. ***Complaint, ¶ 2; A.R.S. § 13-2314; A.R.S. § 13-2301;***

3. The Superior Court in and for Maricopa County has jurisdiction to enter appropriate orders both prior to and following a determination of liability pursuant to A.R.S. § 13-2314, including forfeiture orders pursuant to A.R.S. §§ 13-2314 and 13-4301, *et seq.*, particularly § 13-4302. ***Complaint, ¶ 3; A.R.S. § 13-2314; A.R.S. § 13-4301, et seq.;***

4. Venue is proper in Maricopa County. ***Complaint, ¶ 4; A.R.S. § 13-2314; A.R.S. § 13-2301; A.R.S. § 13-4303;***

5. This action includes an *in rem* racketeering forfeiture action seeking forfeiture of specified property under A.R.S. §§ 13-2314(G), and the procedures in A.R.S. § 13-4311. ***Complaint, ¶ 12; A.R.S. § 13-2314; A.R.S. § 13-4301, et seq.;***

Appendix C

6. Defendant SALVATORE GRAVANO, a.k.a. JIMMY MORAN, knowingly conducted and participated in the conduct of the affairs of the Gambino Organized Crime Family, a criminal enterprise the conduct of which would constitute a violation of A.R.S. § 13-2312(B), through a pattern of racketeering activity, including MURDER, in violation of New York law analogous to A.R.S. § 13-1105, and EXTORTION, in violation of New York law analogous to A.R.S. § 13-1804, which are included in the definition of racketeering in A.R.S. § 13-2301(D)(4). ***Plea Agreement, Superseding Information, and Judgment and Sentence in New York District Court, United States v. Gravano, 90 CR 1051 (S-1) (ILG); A.R.S. § 13-2312(B); A.R.S. § 13-1105; A.R.S. § 13-1804; A.R.S. § 13-2301(D)(4);***

7. All monies deposited by SALVATORE GRAVANO with the Clerk of the Maricopa County Superior Court in response to the Order of July 3, 2000 in this action (being a subset of the property described in Appendix One, Item 091P, to the Complaint, as more completely described in the Attachment to Appendix One relating to Item 091P), were acquired in violation of A.R.S. § 13-2312, and constitute proceeds as defined in A.R.S. § 13-2314(N)(3), traceable to conduct described in A.R.S. § 13-2301(D)(4), to wit, the conduct described in ¶ 6 above.

Appendix C

Order Dated July 3, 2000, Reporter's Transcript of Proceedings in CV 2000-007692, dated March 7, 2001, at 80, lines 5-19; and Minute Entry dated April 3, 2001, in CV2000-007692;

8. The racketeering committed by Mr. Gravano in connection with the Gambino Organized Crime Family was extensive, lengthy and far-reaching. There are many more persons who have been injured by the racketeering conduct that gives rise to the forfeiture of these contract rights, and the funds that have been generated by these contract rights, than those who have made themselves known to this Court to date.

9. The Arizona Attorney General's Office incurred costs and expenses, including reasonable attorney fees, in obtaining this order, exclusive of other costs and expenses incurred in this matter to date.

The Court also makes the following

CONCLUSIONS OF LAW:

1. The "Underboss" proceeds are traceable to racketeering in this matter; the proceeds would not exist were if not for Mr. Gravano's criminal activities in New York.

2. Those activities also violate Arizona's racketeering laws.

3. Arizona's forfeiture statutes are not directed solely at published works or the income derived from published

works. Rather, these are general forfeiture statutes allowing the State to seize any property that is the proceeds of racketeering.

4. The statutes provide for full due process before the deprivation of property, ensuring that only individuals who have violated Arizona's racketeering laws will have their publication rights adversely impacted. Only acts of racketeering and the proceeds of racketeering are affected.

5. The Arizona forfeiture statutes are content neutral and narrowly drawn, relating only to racketeering violations.

6. To the extent that Arizona's forfeiture statutes do indirectly impact Mr. Gravano's right of free speech, the existence of those statutes is justified by compelling state reasons and there is no less restrictive alternative.

7. Depriving criminals of the profits of their crimes, using those funds to compensate victims, and ensuring that Arizona does not become a haven for the illegal proceeds of racketeering constitutionally justifies the forfeiture of the "Underboss" proceeds.

8. Because this forfeiture is clearly aimed at all income caused by racketeering and does not single out publication proceeds, it is distinguishable from the statutes considered in *Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 502 U.S. 105 (1991).

9. Pursuant to A.R.S. § 13-2314(G), this Court is required to protect "the rights of any person who sustained

injury to his person, business or property by the racketeering conduct" when ordering a forfeiture, which requires a determination of who those people are and the nature, extent, and cause of their injuries.

10. The judgment in favor of the State of Arizona relating to its costs and expenses, including reasonable attorney fees, is not to be collected from the forfeited property, but is to be collected from other assets.

The court having found that the property is subject to forfeiture, notice to all persons who have filed claims in this action relating to the property having been given, and just cause appearing,

IT IS THEREFORE ORDERED:

1. The property described in Notice of Pending Forfeiture, Item Number 091P is subject to forfeiture, including all interests in income generated by the accrual of royalties or by the application of these forfeited rights to other or additional royalties. All rights of all persons, including all defendants and claimants in this action, in this property are hereby forfeited to the State of Arizona.

2. The Arizona Attorney General's Property Manager and Victim Witness advocate shall assist this Court in locating and identifying all persons who have been injured by the racketeering giving rise to this forfeiture by publishing notice in New York that:

a. summarizes the requirements of entitlement to this Court's consideration as a person injured in his or her person, business, or property by the racketeering.

b. gives notice that people who do not make a proper application for intervention within thirty days of the publication will not be considered in the Court's eventual distribution of the forfeited proceeds; and

c. provides a mail and e-mail address at which responses may be made and processed.

3. The Notice shall be published by the Attorney General in substantially the following form:

PUBLIC NOTICE TO VICTIMS OF THE GAMBINO ORGANIZED CRIME FAMILY AND SALVATORE "SAMMY THE BULL" GRAVANO

The State of Arizona, by its Attorney General Janet Napolitano, has forfeited the income of Salvatore "Sammy the Bull" Gravano from the book *Underboss: Sammy the Bull Gravano's Story of Life in Mafia*, because it is the proceeds of Gravano's racketeering. It did so in a civil forfeiture action in Maricopa County, AZ, titled *STATE OF ARIZONA ex rel. JANET NAPOLITANO, Plaintiff, vs. SALVATORE GRAVANO a.k.a. JIMMY MORAN, et al., Defendants,* NO. CV 2000-007692. Arizona's forfeiture laws, A.R.S. § 13-2314(B), (D)(6) and (G), require courts entering racketeering-based forfeiture orders to make provision for the rights of any person who sustained injury to his or her "person, business

or property by the racketeering conduct." The only requirements of eligibility for this protection are that the person sustained injury to the person's person, business or property and that the injury was caused by the racketeering conduct. The word "person" here includes a business, a corporation, a partnership, etc., not just a human being. There is no requirement that the person be an Arizona resident, or that the person be injured by conduct that occurred in Arizona. In this case, the conduct occurred primarily in New York, but all Gambino Organized Crime Family conduct between 1970 and 1991 is included.

The racketeering conduct alleged in the Arizona Attorney General's Complaint that is relevant to this Notice is the racketeering Gravano engaged in, which consists of the conduct of the Gambino Organized Crime Family from 1970 to 1991, particularly involving:

MURDER, EXTORTION, MAKING, FINANCING AND COLLECTING EXTORTIONATE EXTENSIONS OF CREDIT, GAMBLING, OBSTRUCTION OF JUSTICE, and BRIBERY.

The amount available for payment at this time is about $400,000, but it will increase over time because royalties continue to accrue, and may increase substantially due to the possibility of additional books, movies, etc., based on Gravano's racketeering.

The Arizona statutes give complete control of the allocation of the funds to the Arizona Superior Court. The Arizona Attorney General's Office does not allocate the

funds, but is providing administrative assistance to the Court by helping to collect the names of persons injured by the Gambino Organized Crime Family from 1970 to 1991.

The Attorney General's Office has been in contact with some of the injured persons and their representatives throughout the litigation. As a result of communication with injured persons, the Arizona Attorney General places three options before the injured persons for their response:

1) a joint contribution of the funds, existing and future, to create a scholarship endowment to enable students from Bensonhurst or Brooklyn to attend some outstanding college located in the city of New York. The idea is to provide a viable alternative to mob life, turning the money from this book into a positive influence on the area that the Gambino Organized Crime Family has affected.

2) a joint contribution of the funds, existing and future, to the families of New York City residents and employees injured or killed in the events of September 11, 2001.

3) division of the proceeds by the Court among the injured persons, based on the amounts of each person's injuries.

Each and every person (including businesses, corporations, partnerships, etc.) who believes that they were damaged in their person, business, or property by the Gambino Organized Crime Family between 1970 and 1991 may contact the Attorney General to express their interest

and their desires or suggestions about the appropriate allocation of the funds.

You must provide your name, mailing address, phone and/or e-mail address, a brief description of the loss you suffered and the cause of the loss, and your preference about the allocation of the funds among:

1) a college scholarship funds;

2) donation to New York disaster relief; or

3) division among the injured persons.

If you vote for choice #1), please specify the name of a college to host the scholarship fund.

If you vote for choice #2), please specify the particular charity or relief fund.

If you vote for choice #3), please provide your opinions about how the Court should arrive at fair amounts. The Court would have to assess the many different causes of injury, from the murder of a family provider, to the inflation of concrete prices or other construction prices through bribery or extortion, to illegal gambling losses. It would have to compare different types of damages, including pain and suffering (such as by loss of a family member), direct financial loss (such as by direct extortion), and less direct financial loss (such as by price fixing or loss of contracts). The Court would have to evaluate whether or not the person was in some way responsible for the racketeering conduct

(such as a Gambino Organized Crime Family member who is later murdered by other members). Because funds will continue to come in, if they are divided among a large number of persons, the cost of mailing the annual income to the many injured persons, and of keeping current mailing and eligibility information on each of the recipients, will consume much of the income. Therefore, if you choose 3), please address each of these concerns.

The Attorney General's Property Manager will collect your information and transmit it to the Court. You may reach the Attorney General's Property Manager by:

1) mailing the information to: Gravano Restitution, c/o Cameron Holmes, Financial Remedies Unit, Arizona Attorney General's Office, 1275 W. Washington, Phoenix, AZ, 85007, or

2) e-mailing the information to: "GravanoRestitutionFunds@AG.state.AZ.US".

Responses received more than thirty (30) days after publication of this Notice will not be considered. Persons who have previously notified the Court and the Attorney General of their claims need not respond, but they are welcome to do so to express their preferences about the allocation of funds.

4. The Attorney General's costs of publication will be reimbursed from the forfeited property at the time of distribution.

5. The Attorney General's Property Manager shall collect the names and addresses of the persons who respond to the notice, shall make preliminary inquiry about the factual basis of each respondent's submission, and shall make recommendations, based on its information, about the Court's distribution of the proceeds in the Court's sole discretion.

6. The Attorney General is hereby awarded judgment against Salvatore Gravano in the full amount of its costs and expenses in obtaining this order, including its reasonable attorney fees, upon approval of its application for same. This judgment will be collected from assets other than the property forfeited under this order.

7. Pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure, the Court has determined that there is no just reason for delay and it is therefore directed that judgment as provided for herein be entered forthwith.

ORDERED this 23rd day of October 2001.

s/ Mark R. Santana
The Honorable Mark R. Santana
Superior Court Judge

APPENDIX D — ORDER OF THE SUPREME COURT, STATE OF ARIZONA DENYING PETITION FOR REVIEW DATED JULY 1, 2003

SUPREME COURT
STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

July 1, 2003

RE: STATE/JANET NAPOLITANO et al v. SALVATORE GRAVANO
Arizona Supreme Court No. CV-03-0028-PR
Court of Appeals Division One No. 1 CA-CV 02-0025
Maricopa County Superior Court No. CV00-007692

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 30, 2003, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Appendix D

Justice Hurwitz recused himself and did not participate in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 1st day of July, 2003.

Noel K. Dessaint, Clerk

APPENDIX E — STATUTES INVOLVED

ARIZONA STATUTES ANNOTATED TITLE 13. CRIMINAL CODE CHAPTER 23. ORGANIZED CRIME AND FRAUD

§ 13-2301. Definitions

* * *

D. For the purposes of §§ 13-2312 through 13-2315, unless the context otherwise requires:

1. "Control", in relation to an enterprise, means the possession of sufficient means to permit substantial direction over the affairs of an enterprise and, in relation to property, means to acquire or possess.

2. "Enterprise" means any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity.

3. "Financial institution" means any business under the jurisdiction of the state banking department or a banking or securities regulatory agency of the United States or a business under the jurisdiction of the securities division of the corporation commission, the state real estate department or the department of insurance.

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4. "Racketeering" means any act, including any preparatory or completed offense, that is committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state and that would be punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving:

(a) Homicide.

(b) Robbery.

(c) Kidnapping.

(d) Forgery.

(e) Theft.

(f) Bribery.

(g) Gambling.

(h) Usury.

(i) Extortion.

(j) Extortionate extensions of credit.

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(k) Prohibited drugs, marijuana or other prohibited chemicals or substances.

(l) Trafficking in explosives, weapons or stolen property.

(m) Participating in a criminal syndicate.

(n) Obstructing or hindering criminal investigations or prosecutions.

(o) Asserting false claims including, but not limited to, false claims asserted through fraud or arson.

(p) Intentional or reckless false statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands.

(q) Resale of realty with intent to defraud.

(r) Intentional or reckless fraud in the purchase or sale of securities.

(s) Intentional or reckless sale of unregistered securities or real property securities.

(t) A scheme or artifice to defraud.

(u) Obscenity.

(v) Sexual exploitation of children.

(w) Prostitution.

(x) Restraint of trade or commerce in violation of § 34-252.

(y) Terrorism.

(z) Money laundering.

(aa) Obscene or indecent telephone communications to minors for commercial purposes.

(bb) Counterfeiting marks as proscribed in § 44-1453.

5. "Records" means any book, paper, writing, computer program, data, image or information that is collected, recorded, preserved or maintained in any form of storage medium.

Appendix E

6. "Remedy racketeering" means to enter a civil judgment pursuant to this chapter or chapter 39 of this title[1] against property or a person who is subject to liability, including liability for injury to the state that is caused by racketeering or by actions in concert with racketeering.

* * *

1. Section 13-4301 *et seq.*

Appendix E

§ 13-2312. Illegal control of an enterprise; illegally conducting an enterprise; classification

A. A person commits illegal control of an enterprise if such person, through racketeering or its proceeds, acquires or maintains, by investment or otherwise, control of any enterprise.

B. A person commits illegally conducting an enterprise if such person is employed by or associated with any enterprise and conducts such enterprise's affairs through racketeering or participates directly or indirectly in the conduct of any enterprise that the person knows is being conducted through racketeering.

C. A person violates this section if he hires, engages or uses a minor for any conduct preparatory to or in completion of any offense in this section.

D. A knowing violation of this section is a class 3 felony, except that a knowing violation of subsection C is a class 2 felony and the person convicted is not eligible for probation, pardon, suspension of sentence or release on any basis until the person has served the sentence imposed by the court or the sentence is commuted.

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§ 13-2314. Racketeering; civil remedies by this state; definitions

A. The attorney general or a county attorney may file an action in superior court on behalf of a person who sustains injury to his person, business or property by racketeering as defined by § 13-2301, subsection D, paragraph 4 or by a violation of § 13-2312 for the recovery of treble damages and the costs of the suit, including reasonable attorney fees, or to prevent, restrain, or remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312. If the person against whom a racketeering claim has been asserted, including a forfeiture action or lien, prevails on that claim, the person may be awarded costs and reasonable attorney fees incurred in defense of that claim. In actions filed by the state or a county, awards of costs and reasonable attorney fees are to be assessed against and paid from monies acquired pursuant to §§ 13-2314.01 and 13-2314.03.

B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 after making provision for the rights of any person who sustained injury to his person, business or property by the racketeering conduct and after a hearing or trial, as appropriate, by issuing appropriate orders.

C. Prior to a determination of liability such orders may include, but are not limited to, issuing seizure warrants, entering findings of probable cause for in personam or in rem forfeiture, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, the creation of receiverships and the enforcement of constructive trusts, in connection with any property or other interest subject to forfeiture, damages or other remedies or restraints pursuant to this section as the court deems proper.

D. Following a determination of liability such orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of treble damages to those persons injured by racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, civil and criminal, including reasonable attorney fees, to be paid to the general fund of the state or the county which brings the action.

6. In personam forfeiture pursuant to chapter 39 of this title to the general fund of the state or county as appropriate, to the extent that forfeiture is not inconsistent with protecting the rights of any person who sustained injury to his person, business or property by the racketeering conduct, of the interest of a person in:

(a) Any property or interest in property acquired or maintained by the person in violation of § 13-2312.

(b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of

influence over any enterprise or other property which the person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

(c) All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and held by the person and all monies, negotiable instruments, securities and other property used or intended to be used by the person in any manner or part to facilitate commission of the offense and that the person either owned or controlled for the purpose of that use.

(d) Any other property up to the value of the subject property described in subdivision (a), (b) or (c) of this paragraph.

7. Payment to the general fund of the state or county as appropriate of an amount equal to the gain that was acquired or maintained through an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 or that any person is liable for under this section.

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E. A person who is liable for conduct described in subsection D, paragraph 6, subdivision (a), (b) or (c) of this section is liable for the total value of all interests in property described in those subdivisions. The court shall enter an order of forfeiture against the person in the amount of the total value of all those interests less the value of any interests that are forfeited before or at the time of the entry of the final judgment.

F. A person or enterprise that acquires any property through an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or through a violation of § 13-2312 is an involuntary trustee. The involuntary trustee and any other person or enterprise, except a bona fide purchaser for value who is reasonably without notice of the unlawful conduct and who is not knowingly taking part in an illegal transaction, hold the property, its proceeds and its fruits in constructive trust for the benefit of persons entitled to remedies under this section.

G. In addition to or in lieu of an action under this section the attorney general or a county attorney may file an in rem action pursuant to chapter 39 of this title[1] for forfeiture, to the extent that forfeiture is not inconsistent with protecting the rights of any person who sustained injury to his person, business or property by the racketeering conduct, of:

---

1. Section 13-4301 *et seq.*

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1. Any property or interest in property acquired or maintained by a person in violation of § 13-2312.

2. Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

3. All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities and other property used or intended to be used in any manner or part to facilitate the commission of the offense.

H. A defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding. For the purposes of this subsection, a conviction may result from a verdict or plea including a no contest plea.

I. Notwithstanding any law creating a lesser period, the initiation of civil proceedings related to violations of any offense included in the definition of racketeering in § 13-2301,

subsection D, paragraph 4 or a violation of § 13-2312, including procedures pursuant to chapter 39 of this title, shall be commenced within seven years after actual discovery of the violation.

J. In any civil action brought pursuant to this section, the attorney general or a county attorney may file with the clerk of the superior court a certificate stating that the case is of special public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or presiding chief judge of the superior court in the county in which such action is pending, and, upon receipt of such copy, the judge shall immediately designate a judge to hear and determine the action. The judge so designated shall promptly assign such action for hearing, participate in the hearings and determination and cause the action to be expedited.

K. The standard of proof in actions brought pursuant to this section is the preponderance of the evidence test.

L. A civil action authorized by this section, including proceedings pursuant to chapter 39 of this title, is remedial and not punitive and does not limit and is not limited by any other previous or subsequent civil or criminal action under this title or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive.

M. The attorney general may appear as amicus curiae in any proceeding in which a claim under this section has been asserted, including proceedings pursuant to chapter 39 of this title, or in which the court is interpreting this chapter or chapter 39 of this title. A party who files a notice of appeal from a civil action brought under this chapter or chapter 39 of this title shall serve the notice and one copy of the appellant's brief on the attorney general at the time the person files the appellant's brief with the court. This requirement is jurisdictional.

N. In this section and § 13-2312:

1. "Acquire" means for a person to do any of the following:

(a) Possess.

(b) Act so as to exclude other persons from using their property except on his own terms.

(c) Bring about or receive the transfer of any interest in property, whether to himself or to another person, or to secure performance of a service.

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2. "Gain" means any benefit, interest or property of any kind without reduction for expenses of acquiring or maintaining it or incurred for any other reason.

3. "Proceeds" includes any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form.

Appendix E

§ 13-4201. Definitions

In this article, unless the context otherwise requires:

1. "Accused" means a person who has been arrested for a felony committed in the state of Arizona and either has been bound over for trial pursuant to a finding by a magistrate during a preliminary hearing of probable cause or has waived such a preliminary hearing or who has been lawfully indicted.

2. "Commission" means the state industrial commission.

3. "Person" means a person as defined in § 13-105 and includes a representative or assignee of such person.

4. "Victim" means any person, including the surviving dependent of a person, who has suffered physical injury or pecuniary loss resulting from the crime of the accused.

Appendix E

§ 13-4202. Void contracts; crime victim accounts; establishment; notice to victims; exceptions; civil liability; definition

A. Every contract whether written or oral, express or implied, with an accused with respect to the reenactment of a crime by movie, book, article, radio or television presentation, live entertainment or expression of thoughts, feelings, opinions or emotions is contrary to public policy and void unless the contract provides for payment to the commission of any monies which would be paid to the accused for such information or rights.

B. The commission shall deposit the monies received pursuant to subsection A from the contracts or agreements of each accused, for each crime committed by the accused, in a separate account designated as a crime victim account. The money shall be distributed as determined by the commission to any victim of the crime committed by the accused if both of the following apply:

1. The accused is convicted of the crime.

2. The victim, within five years after the date of establishment of the account, applies to the commission for compensation and demonstrates by sufficient reliable

evidence, as determined by the commission, that he has suffered a loss resulting from such crime and the amount of such loss.

C. The commission, at least once every year for five years from the date of receipt of monies pursuant to subsection B, shall publish a legal notice in a newspaper of general circulation in the county wherein the crime was committed and in counties contiguous to such county advising all victims for which monies have been received that funds are available to satisfy money judgments pursuant to this section. Such notice shall identify the accused, describe the criminal act involved and the proceedings against the accused and state the procedure to be followed for recovery of monies pursuant to subsection B. No reference to the identity of the victim shall be made. The commission may, in its discretion, provide for such additional notice as it deems necessary.

D. Upon disposition of charges favorable to an accused, the commission shall immediately pay any monies in the account owing to such person.

E. After five years have elapsed following the establishment of the account pursuant to subsection B and upon a showing that no applications for compensation are pending pursuant to this section, the commission shall immediately pay any monies in the account to the state general fund.

F. For purposes of this section, a person found not guilty by reason of insanity pursuant to Rule 23.2, Arizona Rules of Criminal Procedure, shall be deemed to be a convicted person.

G. Whenever it is found, pursuant to rule 11, Arizona Rules of Criminal Procedure, that a person accused of a crime is unfit to proceed as a result of mental illness or defect because such person lacks capacity to understand the proceedings against the person or to assist in his own defense, the commission shall bring an action of interpleader pursuant to Rule 22, Arizona Rules of Civil Procedure, to determine disposition of the escrow account.

H. Notwithstanding any inconsistent provision of law or of the rules of civil procedure with respect to the timely bringing of an action, the five-year period provided for in subsection B shall not begin to run until an account has been established.

I. Notwithstanding subsections B through F the commission shall make payments from the account to any accused upon the order of a court of competent jurisdiction after a showing by the accused that the money will be used for the sole purpose of retaining legal representation at any stage of proceedings against such accused.

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J. An action taken by any person, whether by execution of a power of attorney, creation of a corporate entity or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

K. The cost of administering the account and the monies therein shall be reimbursed to the industrial commission from the account.

L. Any person entering into a contract described in subsection A which does not comply with this section shall be liable to the state for deposit in the crime victim account of an amount equal to all monies paid or received including monies paid to or received by another person by execution of a power of attorney, creation of a corporate entity or otherwise done to defeat the purposes of this section.

M. For purposes of this section "loss" includes the value of any property damaged, destroyed or taken, the cost of medical treatment or counseling, lost wages and any other damage suffered as a result of the crime.

Supreme Court, U.S.
FILED
DEC 22 2003
OFFICE OF THE CLERK

No. 03-651

IN THE
SUPREME COURT OF THE UNITED STATES

SALVATORE GRAVANO,
PETITIONER,

v.

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

BRIEF IN OPPOSITION

TERRY GODDARD
ATTORNEY GENERAL

CAMERON H. HOLMES
CHIEF COUNSEL
FINANCIAL REMEDIES SECTION

PAULA BICKETT
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(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-8482

ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

Does the forfeiture of the proceeds of racketeering that consists of murder and extortion and involves no First Amendment activity, under a statute that is not intended to single out First Amendment activity, and in fact does not do so, violate the First Amendment when it places an incidental financial burden on First Amendment activity?

PARTIES TO THE PROCEEDING

Petitioner is Salvatore Gravano, who was the defendant in the trial court and the appellant in the Arizona Court of Appeals.

Respondent, State of Arizona by the Attorney General Terry Goddard, brought this civil racketeering forfeiture action in the trial court and was the appellee in the Arizona Court of Appeals. Respondents Mona Garafalo, Laura Garofalo, Karen Garofalo, Catherine Colluci, Dawn DeBatt, Michelle DeBatt, and Shirley Shiffren were interveners in the trial court as persons injured by Gravano's racketeering conduct and were appellees below.

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STATEMENT OF THE CASE

Respondent, State of Arizona by the Attorney General Terry Goddard (the State), opposes the Petition for Certiorari filed by Salvatore Gravano (Gravano).

This case concerns whether the application of Arizona's forfeiture statutes to Gravano's racketeering proceeds, which includes his royalties from a book endorsement, violates the First Amendment. The Arizona Court of Appeals correctly followed *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105 (1991), in finding that, unlike the statute at issue in *Simon & Schuster*, the primary purposes of Arizona's forfeiture statutes are content-neutral. Further, the court correctly determined that the forfeiture statutes are content-neutral as applied to the forfeiture of Gravano's book royalties because the trial court determined that the forfeiture statutes applied to the book royalties without evaluating the content of the book. Gravano admitted that there was a causal connection between his racketeering and his contractual right to receive book royalties–that is, Gravano would not have acquired the contract rights and resulting royalties unless he had committed the racketeering acts alleged. The court of appeals also correctly followed this Court's First Amendment decisions, including *Simon & Schuster,* in concluding that Arizona's forfeiture statutes meet the intermediate level of scrutiny applicable to content-neutral regulations as well as the more exacting scrutiny that applies to content-based regulations.

The Arizona decision presents no reason for this Court to grant certiorari. The decision is fully consistent with *Simon & Schuster* and the Court's other First Amendment decisions. It does not conflict with another federal or state court decision. Finally, the court of appeals decision will have a limited effect on future cases in Arizona or elsewhere because it is tied to its unique facts that enabled the State and the Arizona courts to conclude that Gravano's contractual right to receive book royalties was due to his racketeering acts without reviewing the contents of the book.

A. Factual Background

Gravano was a member, and ultimately the second in command–that is, the "underboss"–of the Gambino Organized Crime Family, and was personally responsible for extensive extortion and not less than nineteen murders in New York. Record on Appeal (ROA) 145. After his 1991 plea agreement in federal court in New York, he took up permanent residence in Arizona as "Jimmy Moran." ROA 22. In 1996, while an Arizona resident, Gravano entered into an agreement with author Peter Maas to "exploit" (their word) the economic potential that his murders and extortion had brought him. ROA 2. Under the agreement, Gravano agreed to endorse and promote Maas's book to assure its success. ROA 102. Maas wrote *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia* ("*Underboss*") after a number of hours of collaboration with Gravano that was not asserted to be more than two. A portion of Gravano's income from this contract reflecting royalties from *Underboss* remained unpaid in 1999.

In 1999, the Phoenix Police Department discovered that Jimmy Moran, aka Salvatore Gravano, was the leader and bankroller of a multi-state and international ecstasy distribution ring and that he was using money he had acquired through his racketeering in New York. ROA 22. The racketeering investigation uncovered Gravano's true identity and the existence of the Maas contract rights as part of a comprehensive investigation into the sources and applications of his assets.

B. Procedural Background

After Gravano's arrest in Arizona, the State filed a civil forfeiture action against Gravano and others, seeking forfeiture of their assets including Gravano's contract right to receive book royalties. Gravano moved for partial dismissal of the forfeiture Complaint on the ground that his contractual rights to the *Underboss* royalties were not subject to forfeiture under the applicable statutes and that, if they were, their forfeiture would violate the First Amendment. ROA 90. Various persons injured by Gravano's racketeering moved to intervene in the

action to preserve their rights to recover compensation from the book royalties under Arizona's forfeiture statutes. ROA 132. The trial court granted the motion to intervene. ROA 139; 144. The State then moved for partial summary judgment. ROA 145, 146. Gravano objected to the motion, but filed no evidence in opposition. ROA 156; Petitioner's Appendix (Pet. App.) 6a.

The court granted the State's motion, finding that the *Underboss* proceeds were "traceable to racketeering " because "the proceeds would not exist were it not for Mr. Gravano's criminal activities in New York." Pet. App. 28a. The court also found that Arizona's forfeiture statutes are content-neutral and, to the extent they "indirectly impact Mr. Gravano's right of free speech," the existence of those statutes is "justified by compelling state reasons" and narrowly tailored. Pet. App. 29a. The court then entered a final order forfeiting the royalties to the State and directing the State to locate and identify persons injured by Gravano's New York racketeering to effectuate their right to compensation. Pet. App. 37a.

Gravano appealed, arguing that the forfeiture violated his First Amendment rights. The Arizona Court of Appeals affirmed. Applying this Court's analysis for determining whether a statute is content-based or content-neutral in *Simon & Schuster*, the court concluded that Arizona's forfeiture statutes are content-neutral. Pet. App. 13a to 15a. The court found that the statutes contained "no reference to the content of speech or expressive materials" and have speech- and content-neutral purposes–that is, they are intended to "remov[e] the economic incentive to engage in racketeering, reduc[e] the financial ability of racketeers to continue to engage in crime, prevent[] unfair business competition by persons with access to crime proceeds, compenstat[e] victims of racketeering, and reimburs[e] the State for the costs of prosecution." Pet. App. 14a. The court also relied on *Simon & Schuster* to conclude that the State has a " 'compelling interest in ensuring that victims of crime are compensated by those who harm them' " and " 'in ensuring that criminals do not profit from their crimes.' " Pet. App. 16a (quoting *Simon & Schuster*, 502 U.S. at 118–19). Finally, the court determined that "Arizona's forfeiture statutes not only survive intermediate

scrutiny, but also are narrowly tailored to further the compelling interests of the State," and thus more narrowly drawn than New York's "Son of Sam" law that this Court invalidated in *Simon & Schuster*. Pet. App. 20a. The Arizona Supreme Court denied Gravano's petition for review.

All portions of the case not resolved by the partial summary judgment, including Gravano's liability for investing Gambino Organized Crime Family money in three Arizona enterprises, Mayan Investments, Marathon Construction, and Uncle Sal's Italian Ristorante, are presently pending trial.

REASONS TO DENY THE PETITION

I. The Arizona Court of Appeals Correctly Applied the Law in *Simon & Schuster* to the Facts Before It.

A. The Court Correctly Concluded that the Arizona Forfeiture Statutes Are Content-Neutral.

Gravano argues that the court of appeals decision sharply conflicts with *Simon & Schuster* because it found that Arizona's racketeering forfeiture statute is not content-based. Petition (Pet.) at 7. However, there is no conflict between the cases because *Simon & Schuster* does not address a racketeering forfeiture statute like the Arizona statutes at issue here. Moreover, the court of appeals correctly followed *Simon & Schuster* in concluding that the purposes of Arizona's racketeering statutes are content-neutral and content-neutral as applied to the forfeiture of Gravano's contractual right to book royalties based on the undisputed facts in the record. This Court therefore does not need to review the Arizona decision. *See* Supreme Court Rule 10 ("A petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

The designation "content based" is focused on primary purposes, not incidental effects. *Simon & Schuster*, 502 U.S. at 122 n* (statutes are content neutral where "intended to serve purposes unrelated to the

content of the regulated speech, despite their incidental effects on some speakers but not others"). "Content" refers to ideas and viewpoints, not to the economic reason for the commercial value of the speech. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate [speech] based on hostility–or favoritism–towards the underlying message expressed."). The point of identifying such motivation is that such laws "pose the inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991). The controlling consideration is therefore the government's purpose in enacting the regulation. *Id.*

The court below correctly concluded that the purposes of Arizona's racketeering forfeiture statute is unrelated to the content of any expression. They include: "removing the economic incentive to engage in racketeering, reducing the financial ability of racketeers to continue to engage in crime, preventing unfair business competition by persons with access to crime proceeds, compensating victims of racketeering, and reimbursing the State for the costs of prosecution." Pet. App. 14a. The complete text of the relevant Arizona racketeering statutes are in Pet. App. E; Arizona Revised Statutes (A.R.S.) § 13–2314 authorizes civil remedies for racketeering including the forfeiture of its proceeds. The statute makes no distinction based on the ideas or views expressed, on the subject matter or type or medium of expression, or even on whether expression of any kind is involved. Strict scrutiny does not apply because Arizona's forfeiture statutes are content-neutral.

Gravano has not asserted here that this statute was motivated by disapproval of the content of works about crime. Indeed, he admitted in his Petition for Review in the Arizona Supreme Court that the "Arizona legislature has never given the slightest thought to this use of the racketeering law." Petition for Review at 8. Instead, Gravano

claims that the application of Arizona's forfeiture laws to his contractual right to receive book royalties violates the First Amendment because the causal connection between the racketeering and the contractual right cannot be determined without examining the book's contents. Pet. at 8. However, the State and the lower courts did make that exact determination without any examination of the contents of *Underboss*.

The State based its partial summary judgment on A.R.S. § 13–2314(G)(3), a "proceeds" cause of action, asserting that Gravano acquired the contract rights as a result of the racketeering that Gravano admitted in his 1991 New York plea agreement–that is, murder and extortion. Gravano acquired the subject property rights when he contracted with Maas, and they became subject to forfeiture at that time. *See* A.R.S. §§ 13–4310(F) and 13–4314(B) (relation back of title to time of event). Gravano's acquisition of these contract rights would not have occurred but for his racketeering, so it was both "acquired through" and "caused by" racketeering, because its commercial value was substantially the result of his racketeering.[1] Thus, this forfeiture was complete before the book was even written, and did not depend on its content. Gravano did not submit any facts to controvert the State's factual assertion that there was a causal connection between Gravano's racketeering and his contractual right to receive book royalties. Pet. App. 6a. Neither the trial court nor the court of appeals ever read or considered the book and it is not part of the record. The courts below did not even have occasion to inquire into whether the book contained an account of his crimes or not.

---

1. Had Gravano brought racketeering cash to Arizona and buried it, then dug it up in 1996 and put it into a bank, it would still have been racketeering proceeds after its conversion into a contract right (the bank account). Had Gravano endorsed a pistol silencer for a gun manufacturer, like Michael Jordan endorsing basketball shoes, this, like digging up buried cash, would have activated his stored commercial value from his racketeering. The bank account and the silencer endorsement contract would have been proceeds of his extortion/murder enterprise. Gravano's endorsement of a book, ROA 65, likewise acquired contract rights as proceeds, activating his stored commercial value, which was in turn a result of his murders and extortion.

The court of appeals found that:

> when forfeiture of book proceeds is sought, the causal connection between racketeering conduct and the proceeds is present if the commercial value of the book contract is substantially the result of racketeering. In other words, a causal connection exists if the storyteller's notoriety from racketeering is what makes the story marketable.

Pet. App. 14a. Thus, a book would not have to contain any account of any crime, while a causal connection to racketeering may be absent even if a work does include a description of crimes. The court of appeals therefore correctly concluded that the application of Arizona's forfeiture laws to Gravano's contractual right to receive book royalties was content-neutral because it did not require examination of the contents of *Underboss*.

Gravano argues that it is difficult under forfeiture statutes such as these to assess the causal link between racketeering and acquisition of property through endorsement of a publication without reference to the subject matter of the speech involved. Although it may be difficult in some cases to make the causal connection without examining the content of the publication,[2] in this case, it was not. Gravano did not

---

2. Forfeiture may apply to many forms of expression, whether book, film, TV program, stolen manuscript, fraudulent stock prospectus, ransom demand, stick-up note, or bomb threat, just as it may apply to much non-expressive conduct. In the limited context of books, the causal nexus between racketeering conduct and the proceeds of the book is not present unless the commercial value of the book is substantially the result of the racketeering. Thus, a causal nexus may be absent even if the expression involves a description of a particular crime, even a heartless celebration of a crime, or is intended to hurt the victims or the families of the victims. No particular content will supply the nexus if it is not independently present, and books whose commercial value is not the result of racketeering cannot trigger the nexus element, no matter how offensive. Thus, nothing in the racketeering forfeiture statute has the effect of discouraging speech on the ground that it is "offensive or disagreeable." *Simon & Schuster*, 502 U.S. at 118. On the other hand, a causal nexus may be present even if the proceeds-generating event has no expressive element or,

(continued...)

contest and later conceded the causal nexus between the racketeering conduct and the forfeited property (the contract rights). Thus, this forfeiture does not present this issue because Gravano himself obviated the need to prove causation without reference to the content of the expression.

B. The Court of Appeals Correctly Found that the Arizona Forfeiture Statutes Survive Both Intermediate and Strict Scrutiny Review.

The court of appeals correctly determined that the application of racketeering forfeiture statutes to these endorsement proceeds furthered compelling state interests. Pet. App. 15a–18a. Gravano has formally conceded that this Court's holding that "the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them," *Simon & Schuster*, 502 U.S. at 118–19, and in "ensuring that criminals do not profit from their crimes," *id.*, apply here. Pet. App. 16a. Gravano does not argue in his Petition that the court erred in concluding that the racketeering forfeiture statute serves compelling state interests.

Gravano argues, however, that the application of Arizona's racketeering forfeiture statutes to book royalties is not narrowly tailored to achieve the State's interest. Gravano's argument fails because he does not even address whether the forfeiture statute meets the intermediate level of scrutiny. Moreover, the court of appeals correctly found that the racketeering forfeiture statute is narrowly tailored.

In *United States v. Albertini*, the Court explained the parameters of the intermediate scrutiny test:

---

2. (...continued)
in the context of a book, the expression consists of a book that is not about crime at all, or, if about crime, is an apology to victims or has some other purpose that any particular reader may find laudable.

> The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. . . . Regulations that burden speech incidentally . . . must be evaluated in terms of their general effect. Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Cf. 468 U.S. at 297 ("if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment"). The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.

472 U.S. 675, 688-89 (1985) (citations omitted)

The Arizona racketeering forfeiture statute promotes substantial government interests that would be achieved less effectively absent the statute. Gravano does not demonstrate otherwise; he focuses only on the statute's possible application to expressive works, not its general application to racketeering proceeds, and asserts that the racketeering forfeiture statute would apply to a wide variety of expressive works. Gravano simply ignores that the racketeering forfeiture statute directly furthers the State's interest in "preventing racketeers from benefitting from their crimes, and [] compensating victims for their losses and the State for costs incurred in the prosecution of racketeers." Pet. App. 20a. Gravano also ignores that the State must prove the causal connection between racketeering and expressive works–that is, that the monetary value received by the racketeer from the expressive work is substantially a result of his or her racketeering. Pet. at 11-12 (pointing out that numerous books and films describe criminal activity but

presenting nothing that indicates that property was obtained due to a contract with a criminal to exploit his or her notoriety that was achieved through racketeering). The racketeering forfeiture statute does not apply unless the State can prove a causal connection. Thus, the racketeering forfeiture statute satisfies the intermediate scrutiny test.

Further, the court of appeals correctly held that, unlike the New York "Son of Sam" statute struck down in *Simon & Schuster*, Arizona's forfeiture statutes are narrowly tailored to achieve the State's compelling interests. Pet. App. 18a to 21a. Each of the features of the New York "Son of Sam" statute that made it impermissibly broad are addressed with appropriate limitations in Arizona's racketeering forfeiture statute.[3]

• The former New York "Son of Sam" statute applied only to speech, singling out income derived from expression for a burden placed on no other income. *Simon & Schuster*, 502 U.S. at 116. The breadth of its effect on speech was increased by several statutory features:

> – The criteria for inclusion swept in all "re-enactment of such crime" and "the expression of . . . thoughts, feelings, opinions or emotions regarding such crimes," *id.* at 109. and therefore applied "to works on any subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally." *Id.* at 121.

---

3. Gravano's attempt to paint this civil racketeering prosecution as a substitute for a "Son of Sam" action, Pet. at 4, is factually groundless. This royalties issue is in fact a small part of a classic civil racketeering action against a former mobster turned Arizona drug dealer, who happened to have an asset that was the result of expression. The Arizona Attorney General does not even have authority to bring any action under Arizona's version of that statute, A.R.S. § 13-4202. That statute has no place in this discussion.

– It applied to writings of a "person convicted of a crime," but this term was a misnomer because the definition of "person convicted of a crime" included self-admission, which included even admissions made just in the book itself. *Id.*

– The crime could include an offense for any motive, including political or religious expression in the form of protest. *Id.* at 121-22.

– The crime could be any level of offense, including petty offenses such as trespassing or petty theft. *Id.* at 123.

– The statute swept away statutes of limitation. *Id.*

• The financial effect of inclusion was not limited to compensation of victims of the crime; the statute required that the proceeds of expression were escrowed for a minimum of five years in any event, burdening speech by delay alone. *Id.* at 123.

• The purpose of the escrow was not limited to prevention of benefit from crime or compensation of victims, because the escrowed money was made available to all creditors of the author, not just victims of the crime. *Id.*

The cumulative effect of these provisions was that:

> the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated. Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author's creditors . . . .

502 U.S. at 122-23.

Proceeds forfeiture under Arizona's statutes is entirely different on each of these over-inclusive features:

• The racketeering forfeiture statute applies only to proceeds of racketeering. Thus, there is no possibility that the statutes can affect any speech that is not the proceeds of racketeering, including any unusual case that affects speech, and therefore a compelling state interest is served by each application. The racketeering statutes further narrow the scope of the effect they can have in any context, including speech:

> – The criteria for inclusion is proof that the commercial value of the speech is substantially the result of racketeering. If the connection between the racketeering and the income is not substantial, forfeiture is not possible. Pet. App. 19a. Thus, if the expressive conduct mentions a crime only "tangentially or incidentally," there can be no forfeiture. *Id.*
>
> – They operate on a formal accusation and afford full due process prior to the deprivation of property. Pet. App. 20a. Forfeiture requires the State to prove the underlying racketeering and the nexus between the racketeering and the property subject to forfeiture. The burden of proof is on the State, by a preponderance of the evidence, A.R.S. § 13-4311, as in other civil litigation. The full panoply of civil procedural rights are available. It is not possible that an author's admission, in a book or otherwise, would suffice, by itself, to give rise to liability. Gravano was found civilly liable on the basis of his federal conviction of the underlying offenses through statutory estoppel and on the basis of causation that he admitted, a procedure that fully complies with due process. *See* Pet. App. 20a.

– The statutory requirement of a causal nexus between racketeering and the acquisition of the property in question requires the occurrence of "racketeering" which, by the definition in A.R.S. § 13-2301(D)(4), requires that the criminal conduct be for financial gain. This eliminates any political, religious, social-conscience, drug-addiction, rage, sexual deviance, youthful prank or other non-financial motive. This is significant because it limits the financial remedy to just that conduct that is financially motivated, where forfeiture will have its intended deterrent and compensatory effect, leaving out conduct that is less likely to be deterred by financial disincentive and less likely to generate need and opportunity for compensation. A crime of conscience never triggers any Arizona racketeering remedy. *See* Pet. App. 19a.

– The statutory requirement of a causal nexus between "racketeering" and the acquisition of the property in question also requires that the conduct be a serious offense, punishable by a year in prison. A.R.S. § 13-2301(D)(4). Minor offenses cannot give rise to liability, even if income from, for example, a book, is entirely attributable to the minor criminal conduct.

– There is a statute of limitations that applies to proceeds forfeitures, A.R.S. § 13-2314(I), unlike the effect of the "Son of Sam" statute, 502 U.S. at 123. The fact that the statute of limitations may be triggered by the acquisition of proceeds, which may take place after the underlying events, does not mean that the racketeering forfeiture statute does not have a statute of limitations, as was true of the "Son of Sam" statute.

• The financial effect of inclusion is limited to the forfeiture of the proceeds, in contrast with the mandatory minimum five-year wait under the New York "Son of Sam" statute. Once a deprivation has occurred, litigation must begin promptly, see A.R.S. §§ 13-4308 and 13-4311(K)

(creating time limitations that are far more expeditious than civil rule limitations).

• The purpose of the litigation is strictly limited to prevention of benefitting from crime or compensation of victims. In every case in which there is a victim, the statutes provide for compensation of victims of the crime. Compensation is limited to victims of the crime that gave rise to the forfeiture, not just any crime. A.R.S. §§ 13-4301(3) (definition of "injured person"); 13-4311(I), (J) and (N)(3) (prescribing procedures for assertion of injured person status); 13-2314(G) (protection is for persons injured by "the racketeering conduct" referring to the racketeering conduct that gave rise to the order of forfeiture). If there is property that is not subject to the forfeiture remedy, the property is not given to the creditors of the writer, to taxing authorities, or to any other person not directly victimized by the crime.

The cumulative effect of these provisions is that the commercial value of the autobiography of a person who achieved prominence by means other than racketeering would not be substantially derived from racketeering, even if he mentioned many crimes; no theft of a nearly worthless item would ever qualify as racketeering because it is not punishable by a year in prison; no youthful prank, no matter how damaging or tragic its result, would ever qualify as racketeering because it is not for financial gain; any doubt about whether he actually committed racketeering would have to be overcome by formal accusation and ultimately by proof by a preponderance of the evidence; there would never be a five-year escrow, because shorter than normal civil litigation deadlines would produce a prompt result; and no book income would ever be made available to creditors other than the State and actual victims of the racketeering. Because each of the features of the "Son of Sam" statute that made it impermissibly broad are directly addressed with appropriate limitations in the racketeering forfeiture statute, the statute is narrowly tailored to serve the compelling government interests.

II. This Case Does Not Conflict with Other Federal or State Cases Nor Is the Issue Presented Here Likely to Reoccur.

Although Gravano argues that this case conflicts with other state cases, Pet. at 6, he has not cited a single case that directly conflicts with the court of appeals decision here. Gravano only cites cases that follow *Simon & Schuster* by invalidating statutes similar to New York's "Son of Sam" law. *See* Pet. at 3-4 (citing *Keenan v. Superior Court*, 40 P.3d 718 (Cal.), *cert. denied*, 537 U.S. 818 (2002); *In re Opinion of the Justices to the Senate*, 764 N.E.2d 343 (Mass. 2002); *Curran v. Price*, 638 A.2d 93 (Md. 1994). The court of appeals opinion here does not conflict with these state cases for the same reason that it does not conflict with *Simon & Schuster.*

Gravano also urges the Court to grant certiorari because the issue is likely to reoccur and the decision will stifle certain expression. However, the facts here are unique and, in any event, application of Arizona's racketeering forfeiture statute to book or movie royalties is unlikely to reoccur.

In this case, the State did not need to examine the content of *Underboss* to assert that Gravano's rights to royalties were the result of his racketeering because Gravano's contract with Maas demonstrated the causal connection. The State did not even need to prove that the contract established the requisite causal connection because Gravano did not object to the State's assertion and admitted the causal relationship. This Court may want to revisit *Simon & Schuster* in a case in which the government has sought to prove application of a general forfeiture statute to royalties from an expressive work based on the content of the work. This is not that case.

Although Arizona's racketeering forfeiture statute has been in effect since 1982, this is the first application to royalties from an expressive work. Likewise, the similar statutes in other states have produced no known similar cases in their many years of collective existence. One reason is that the racketeering forfeiture statute exempts many interests, so the effects on legitimate commerce are appropriately very limited.

See A.R.S. § 13-4304. Another reason is the scarcity of cases in which the causal connection between racketeering and proceeds from some First Amendment protected activity is both evident and openly admitted by the defendant. Another may be that there are other similar mechanisms to accomplish a similar result. Courts since *Simon & Schuster* have held that orders of restitution that were intended to recapture any income the defendant acquired in connection with First Amendment-protected exploitation of the crime can be crafted in such a way that they do not violate the First Amendment. *See, e.g., United States v. Jackson*, 978 F.2d 903, 914–15 (5th Cir. 1992) (restitution order anticipating possible book or movie income concerning the kidnaping remanded for factual findings with proviso that district court cannot limit a restitution order solely to the income the defendants earn on speech associated with their criminal activities); *United States v. Branch*, 91 F.3d 699, 744-45 (5th Cir. 1996) (defendants convicted of offenses arising out of a gun battle were properly ordered to pay over one million dollars in restitution, so long as final order was not limited to proceeds of movie, book, newspaper, magazine, radio, television production, etc.). Private civil actions by victims against defendants are another avenue of compensation that could reach the proceeds of related expression. Because other mechanisms exist to prevent wrongdoers from benefitting while their victims are left uncompensated, use of proceeds forfeiture is likely to remain as rare in such situations as it has been in the previous nearly thirty years of its existence.

CONCLUSION

Based on the foregoing authorities and arguments, the State respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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SALVATORE GRAVANO,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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Remarkably, the State of Arizona effectively concedes both that it disagrees with this Court's decision in *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), and that the *Simon & Schuster* decision would not permit a government to "appl[y] . . . a general forfeiture statute to royalties from an expressive work based on the content of the work." Br. in Opp. at 15 (suggesting that the Court "may want to revisit" the *Simon & Schuster* decision should such a case arise). But that is precisely what happened here, and if, as the State suggests, a "revisiting" of *Simon & Schuster* is appropriate in these circumstances, the Court should grant certiorari here in order to undertake it. Indeed, those portions of the State's Brief in Opposition that do not directly bolster Petitioner Salvatore Gravano's assertion that certiorari is appropriate here fail to undermine Gravano's showing that certiorari should be granted.

1. Although the State acknowledges that *Simon & Schuster* does not permit a state to apply a general forfeiture statute to royalties from an expressive work "based on the content of the work" (*ibid.*), its arguments are no answer to the fact that the application of Arizona's racketeering forfeiture statute to *Underboss* was expressly premised – as the Court of Appeals made plain in its very first sentence – on the court's understanding of *Underboss* as "a book about the life and crimes of a convicted racketeer." Pet. App. at 2a; *see also* Pet. at 7-9.

None of the State's theories can erase the Court of Appeals' overtly content-based reasoning, or provide any justification for leaving the Court of Appeals' decision intact. The State's attempt to collapse together the concepts of content-neutrality and viewpoint-neutrality (Br. in Opp. at

5), for example, is contrary to bedrock First Amendment doctrine. *See Hill* v. *Colorado*, 530 U.S. 703, 723 & n.31 (2000). Likewise, the State's assertions that the Court of Appeals reached its essential conclusions about the content of *Underboss* without reading the book (Br. in Opp. at 6), and because Gravano openly acknowledges that *Underboss* is the story of his life of crime (*id.* at 7-8), do nothing to obscure the Court of Appeals' reliance on its understanding of the book's content to justify the application of the forfeiture statute.

Importantly, the State makes no attempt to deny that the Court of Appeals' reasoning would also justify the forfeiture of royalties earned from the broad array of works cited in the Petition (Pet. at 11-13 & nn.2-9), instead noting only that in actions for forfeiture related to those books, the government would have to establish that their authors had contractual rights to receive compensation from them (Br. in Opp. at 9-10) – a showing that would seldom be difficult to make. Paradoxically, in attempting to counter the Petition's showing that the application of Arizona's racketeering forfeiture statute to book royalties is a much less narrowly-tailored means of furthering legitimate objectives than the "Son-of-Sam" law struck down in *Simon & Schuster*, the State argues that a complete and permanent forfeiture is somehow *less* burdensome than a temporary and (possibly) partial escrow (Br. in Opp. at 13-14) – a proposition that confounds common sense.

The State's attempt to convey the unsupported and false impression that Gravano's role in the creation of *Underboss* was limited to a few hours of "endors[ing]" and "promot[ing]" the book (Br. in Opp. at 2) is likewise unavailing. In his contract with Peter Maas, Gravano

promised not only to promote the book but significantly also to "cooperate" with Maas in "preparing" it (*see* Ex. B. to State's Response to Motion for Partial Dismissal Re: Book Proceeds in No. CV 2000-007692 (Maricopa County Superior Court)), and in fact, the lion's share of the 481-page book consists of direct quotes taken from extensive taped sessions with Maas in which Gravano recounted his experiences. *See generally Underboss: Sammy the Bull Gravano's Story of Life in the Mafia* (HarperCollins*Publishers* Inc. 1997). Indeed, even the Court of Appeals acknowledged that Gravano's right to receive royalties was earned through work that was "expressive in nature." Pet. App. at 13a; *see also New York State Crime Victims Bd.* v. *T.J.M. Prods., Inc.*, 705 N.Y.S.2d 320, 323 (N.Y. App. Div. 2000) (describing *Underboss* as "a book by one Salvatore Gravano").

Thus, the State fails to explain how the Court of Appeals' acceptance of its content-based seizure of expression-derived income can be squared with this Court's *Simon & Schuster* decision.

2. The Court of Appeals decision paves the way for the application of innumerable forfeiture statutes to royalties earned from expressive works in a fashion that would effectively render *Simon & Schuster* a nullity. The Court of Appeals decision also tends to suppress a broad range of expression by speakers unwilling to risk foregoing all right to compensation for their efforts in producing it. The State's response fails to counteract these compelling reasons for granting certiorari.

Not only has the State effectively conceded that the scores of forfeiture laws cited in the Petition might be applied to expression-derived income just as Arizona's statute was

applied here, but even in respect to the Arizona statute, the State offers only the unexplained speculation that a similar application is "unlikely to reoccur" (Br. in Opp. at 15) – an equivocation that is woefully inadequate to dull the speech-suppressing effect of the Court of Appeals' decision. And contrary to the State's suggestion, there is nothing "unique" (*ibid.*) or extraordinary about states moving aggressively with respect to expression by persons who have committed racketeering offenses – as *Simon & Schuster* itself, as well as the fact that not one but two States acted to seize Gravano's *Underboss* royalties (*see* Pet. at 3-4), demonstrate. Nor is the public's interest in the expression of such persons "unique" to this case.

The State has thus failed to negative the Petition's showing that the Court of Appeals decision conflicts sharply with this Court's *Simon & Schuster* decision and its progeny, implicates a broad array of state and federal forfeiture statutes as to which the court's reasoning might be similarly applied, and threatens to remove a substantial quantity of protected speech from the marketplace of ideas. The Petition should therefore be granted.

Respectfully submitted,

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